Statutory Sources
of
New York City Government

Prepared for the

NEW YORK CHARTER COMMISSION

by

ARTHUR W. MACMAHON
Department of Public Law, Columbia University

New York Charter Commission

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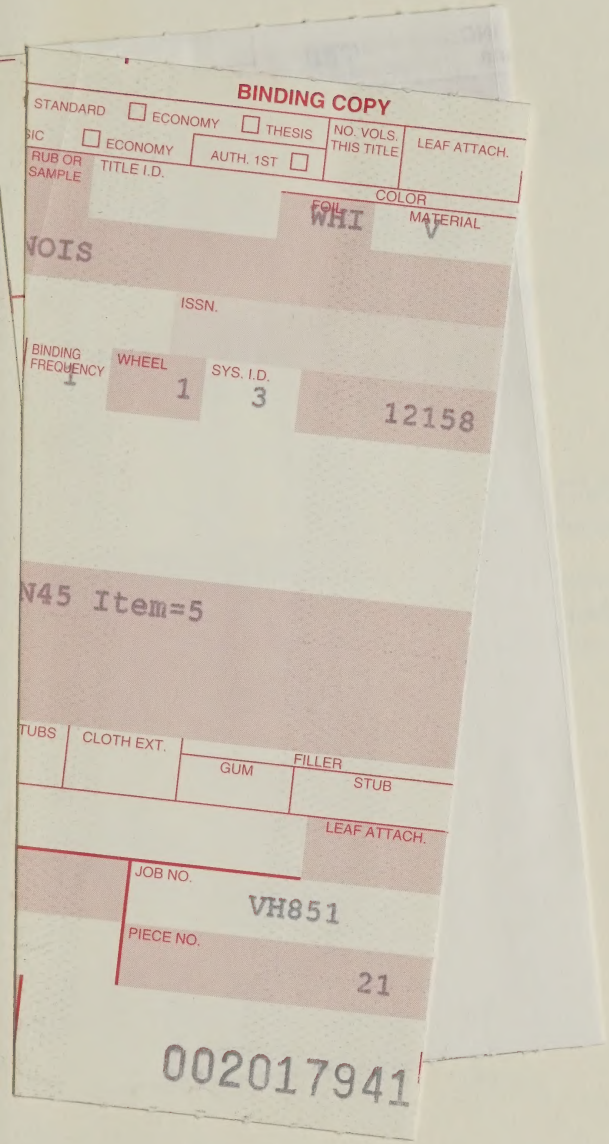
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By

ARTHUR W. MACMAHON

Department of Public Law; Columbia University

Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, in the Faculty of Political Science, Columbia University.

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PREFATORY NOTE

Although I am well aware of the restricted appeal of this monograph, I leave it with a vivid sense of the wide, practical consequences of the problem that it treats. A deplorable wastage of effort results from the century-old tangle of laws that surround the government of New York City. I do not refer to the several miscarried attempts at charter revision in the past, although no one can read without depression the story of the five years of continuous but largely fruitless work after 1907; I am thinking rather of the constant inconvenience, delay and burden upon both city and state authorities implied in the nearly sixteen hundred changes in the laws affecting New York City that have been made since the last reorganization of the charter in 1901; I am thinking even more of the effect of prolixity and uncertainty in the statutory sources of New York City government in causing an unseen drain of time and energy in countless administrative decisions, public actions, and even in uncounted wholly private affairs. I shall be satisfied if this monograph aids slightly in disclosing the problem.

My treatment confines itself to statutory remedies. The fact that I have referred only incidentally to what is called constitutional home rule is not due to neglect but to a recognition of the magnitude of that complicated and separate problem. Regardless of any readjustment of the constitutional relations of state and city, the condition of the legal sources of New York City government would still present a problem and demand a remedy.

A. W. M.

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CHAPTER I.

THE SOURCES IN EVOLUTION.

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In the movement for charter revision, the condition of the statutory sources of the city government has hardly been a less important consideration than defects in governmental structure. Less even than the latter, however, the problem of the make-up of the charter has been incapable of capturing public attention. This has been partly the reason why charter revision has never aroused enough popular support to float its bulk over the shoals of political opposition. Yet the nature of the charter as an instrument—the condition of the sources of the city government in law, as distinguished from the machinery which they create—has a double significance. First, it is important that the charter shall declare what it intends to say with as little ambiguity and confusion of arrangement as possible and with the minimum invitation to litigation, on the one hand, or to time-taking and cumbersome explanatory amendments by the legislature on the other. It is important that the sources of law affecting the city shall be integrated at least in the sense that all active or potentially active sources shall be known, even if not physically assembled, and that in so far as possible the relation of old and new law on the same subject shall be expressly clarified. Second, the make-up of the charter is simply another term for the scope of local power. The degree of charter detail determines the extent to which the city authorities are dependent upon constant and minute control by state legislation. More than that, since a charter usually assigns powers not to a city as a whole but in the main to particular city agencies, it determines

how much flexibility in the every day processes of administration the city authorities will enjoy.

The Complexities Surveyed.

The complexities in the present make-up of the charter may first be briefly surveyed. (1) The charter, in the narrow and formal sense of the act of 1901 and the subsequent statutes which have amended it in terms, contains numerous errors of expression and of arrangement in its half-million words.[1] (2) What is called the charter, however, is in fact only a part of the charter; it does not include all of the acts relating specially to the city and its government. A mass of special acts antedated the charter and were neither included in it nor repealed by it. Since its enactment, their number has been added to constantly. (3) In addition, the city government is conditioned by provisions in the general laws, notably the General City Law, the General Municipal Law, the Education Law, the Civil Service Law, the Election Law, laws affecting cities of the first class, the Rapid Transit Act, the bodies of law which govern the administration of justice in its several phases, as well as by other general acts on particular subjects, some of which, although in form general, apply almost peculiarly to New York City.

The complexities of the situation do not stop with mere lack of order and unity. Uncertainty also exists. As a usual practice, charter revision in the past has not repealed all prior legis-

[1] Provisions regarding procedure in the acquisition of property are found in the charter both in ch. XVII, Title 4 (repealed and enacted anew by L. 1915, ch. 606) and in ch. XXI, secs. 1431-53 (repealed and enacted anew by L. 1915, ch. 596). These two sources of law are sufficiently similar to warrant Ash, *The Greater New York Charter, Annot.*, 4th ed., in giving only one set of annotations to cover both. Turning to another illustration, it is perhaps a superficial confusion of arrangement that has put in ch. XXIII, entitled vaguely "General Statutes," under Title 3 thereof, material as disparate as a provision on the Sunday closing of barber shops (sec. 1535) and the vital provision regarding the power of heads of departments over their subordinates (sec. 1543). The fact that the charter now has two sections numbered 165, added by L. 1905, chs. 517 and 583, cannot be charged as a fault against the original charter, but the confusion which can follow upon even as slight an error as this is illustrated in the omission of one of these sections from the current Ash edition of the charter, which has an almost official status.

lation; it has repealed in general terms whatever has been inconsistent and it has continued the rest. Inconsistency is not discovered until litigation arises. It is only after a point has been before the courts that one can say with certainty what the charter does provide. Such clarifying litigation proceeds slowly, as the exigencies of everyday operation furnish appropriate test cases. This tedious working out of the meaning of blanket repeals of inconsistent law is sufficiently clouded even where the legislature's intention to repeal is obvious. There are respects, however, in which the legislative intent regarding the repeal of early laws affecting the City of New York is itself in doubt. Uncertainty also inheres in the relation between special and general legislation, although here some fairly clear rules facilitate the adjustment.

How has this confused and uncertain condition in the statutory sources of New York City government arisen?

Before considering in some detail the historical reasons for the condition stated, the underlying causes may be anticipated by noting certain tendencies which have characterized charter revision in the past. (1) One factor has been caution. The early charter grants were broad and vague. Every possible privilege or power implicit in these grants was jealously guarded by a city which was in a very real sense a corporate business enterprise.[1] With this view of the city's rights and interests, all existing provisions of law were treasured against future needs. As the bulk of legislation affecting the city increased and as the property interests of the city ramified, the only safe course has seemed to lie in resort to the device of a general repeal of inconsistent legislation and the blanket continuance of all consistent prior law. (2) Haste in charter revision has always been a contributing factor. Even if the will to risk a more courageous policy in disencumbering the city of earlier laws had existed, time

[1] J. S. Davis, *Essays in the Earlier History of American Corporations* (1917), p. 49, which begins its treatment with the remark, "For convenience, nevertheless, we may somewhat arbitrarily set off the public corporations from the private ones, applying a distinction then unrecognized." On the early history of the ferries, see A. E. Peterson, *New York as an Eighteenth Century Municipality, Prior to* 1731 (1917), pp. 124-50. See also G. W. Edwards, *New York as an Eighteenth Century Municipality*, 1731-1776 (1917), *pp.* 85, 93-4, 172-89.

has never sufficed for the excavation and sifting of the legislation which, layer on layer, has long surrounded the charter.

The Revised Laws of 1813.

The earliest,[1] and for nearly three-quarters of a century the only, attempt to draw together and to knit into a unified whole the scattered laws relating to the City of New York was carried out in 1813. It was a part merely of a general codification of the statutes of the state which has been popularly associated with the names of the revisers, Van Ness and Woodworth.[2] One of the chapters which came from their hands was "an act to reduce several laws, relating particularly to the City of New York, into one act."[3] Unlike the "Kent and Radcliff" compilation of 1802, from which, along with the session laws of subsequent years, it drew its material,[4] it did not set down whole statutes in their original form. It went further and, although deliberately avoiding substantial change, resolved their contents into a single act of three hundred and fifteen consecutive sections.

The revision of 1813 was not in any complete sense a charter. The royal grants remained outside it; the Montgomerie charter of 1731,[5] although already supplanted in large part by statutory

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[1] The "Jones and Varick revision," authorized by L. 1786, ch. 35, and carried out in a series of acts on various subjects passed during 1787, did not touch the City of New York. The "Kent and Radcliff compilation," provided for by L. 1800, ch. 70, and L. 1801, ch. 190, and published in two volumes, 1801-2, dealt with New York City legislation, Vol. II, pp. 89-146, but was in no sense a revision; it merely reprinted whole laws *seriatim*.

[2] *R. L.*, 1813. The revision was authorized by L. 1811, ch. 150, appointing and directing Van Ness and Woodworth "to reduce into one act all the different acts or parts of acts which shall or may relate to the same subject or place, which in their judgment shall be most useful and render the said acts most plain and easily to be understood; and that in such acts they omit every or any part or parts of the acts before passed as shall have been previously repealed, or shall have expired by their own limitation." L. 1813, ch. 195, authorized the publication of the revision.

[3] 2 *R. L.*, 1813, ch. 86, pp. 342-460, passed April 9, 1813.

[4] See the note which followed the act, 2 *R. L.*, p. 460, listing the sources in "K & R" (the compilation of 1802) and in "W" (Webster's edition of session laws, vols. 3-6, inclusive). The derivation of particular sections was not indicated.

[5] See *infra*, p. 56, on the continuing effect of the royal charters.

provisions, was still the core of the city's government. The codifiers of 1813 did, however, weave together the active provisions of some eighty-nine acts passed by the provincial assembly, 1691-1775,[1] and of one hundred and fifty-two special statutes affecting New York City, passed between 1778 and the revision of 1813.[2]

Codification raises a problem of repeal which is discussed below,[3] in connection with the Consolidation Act of 1882; it need not be dwelt upon at this point. Ch. 86 of the Revised Laws of 1813 was silent alike regarding repeal and continuance of prior legislation in relation to New York City. A repealer which covered the entire revision was, however, supplied by a separate act[4] passed a few days later; this repealed "all acts and parts of acts heretofore passed by the legislature of this state which come within the purview or operation of any of the acts passed during the present session of the legislature, commonly called the revised acts." Aside from this express blanket repeal and from the indication of legislative intent afforded in the instruction to the revisers to omit obsolete legislation, the repeal at least of Colonial legislation was made doubly sure by the provision of Dec. 10, 1828, that "no statute passed by the government of the late colony of New York shall be considered a law of the State."[5]

The Statutory Sources of the City's Government Permitted to Scatter, 1813-1882.

Not until 1882 was the attempt of 1813 repeated. During the intervening years, the legislation scattered unchecked, and, fall-

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[1] The computation is based on *A Compilation of the Laws of the State of New York relating particularly to the City of New York,* prepared at the request of the Common Council by Henry E. Davies, 1855, pp. 2-12. This compilation was, of course, without legal status or effect. Of the 89 acts listed by title, several affected other localities as well as New York City, several involved essentially private grants within the city, and a number directly imposed trade regulations. For a general statement, see G. W. Edwards, *New York as an Eighteenth Century Municipality,* 1731-1776 (1917), pp. 34-35.

[2] *Statutory Record of Unconsolidated Laws (Special, Private and Local Statutes) of the State of New York* (1911), vol. 2, in Index, at p. 90, note.

[3] See *infra,* pp. 35-52.

[4] L. 1813, ch. 202, passed April 13.

[5] 2 *Rev. Stat.,* p. 779, sec. 4.

ing layer on layer, rested where it fell. The one successful revision of the statutes of the State generally, in 1829-30, evaded the task of consolidating the laws applicable to New York City. "The local laws relating to New York," a note explained, "are exceedingly numerous; a few only have been selected, which are of general and public importance."[1] There was no further general revision of the State laws until the Consolidated Laws were at last achieved in 1909. The magnitude and the delicacy of the task, with attendant difficulty and inertia, increased as rapidly as the need for it. The actual accomplishments of the almost continuous efforts that followed the constitution of 1846 covered only a few particular fields of the law.[2]

The revision of 1813[3] was assumed to continue, as part of the foundation, by the notable charter alterations of 1830,[4] 1849,[5]

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[1] 3 *Rev. Stat.*, 424. The few statutes relating to New York are given pp. 424-442. This revision was authorized by L. 1824, ch. 336 and L. 1825, ch. 324. It was carried out in acts passed in 1827 and 1828, published in 1829 and 1830. The *Revised Statutes* ran through a number of editions, the 9th of which appeared in 1896. Strictly speaking, the revision of 1827-8 was essentially static and these enlargements were without official standing. On this point see *Matter of* Norton (1899), 39 App. Div., 369.

[2] A review of the course of consolidation generally in New York State may throw light indirectly upon the tardiness with which New York City legislation was revised. The Constitution of 1846, Art. 1, sec. 17, directed that "the Legislature, at its first session after the adoption of this Constitution, shall appoint three commissioners, whose duty it shall be to reduce into a written and systematic code the whole body of the law * * *." Such a commission was constituted under L. 1846, ch. 59. A Code of Procedure (the "Field Code" so-called) was adopted 1848-9. The Code of Remedial Justice, adopted in 1876, was supplanted in the next year by the Code of Civil Procedure. Progress was slow; the Code of Criminal Procedure was first reported in 1849, the Penal Code in 1865, yet they were not adopted until 1881. A revision of the banking laws took place in 1882. The Statutory Revision Commission was set up by L. 1889, ch. 289, and was continued by L. 1890, ch. 313. Before its abolition under L. 1900, ch. 664, some 48 general laws had been adopted, accomplishing a partial revision. The permanent Board of Statutory Consolidation, established by L. 1904, ch. 664, accomplished a complete revision of the general laws in the enactment of the Consolidated Laws of 1909. The history of codification from the beginning is reviewed in the Report of the Board of Statutory Consolidation, Feb. 24, 1908, *N. Y. Ass. Docs.*, 1908, no. 50.

[3] As an example of the continuing applicability of ch. 86 of the Revised Laws of 1813, see *Matter of* Commissioners of Central Park, 50 N. Y., 493, 495 (1872), which said "The law of 1813 (*2 R. L.*, 408), regulating the opening and laying out of streets, etc., in the City of New York, is still in force, and except as modified by subsequent legislation, prescribes the forms of procedure in all cases."

[4] L. 1830, ch. 122.

[5] L. 1849, ch. 187.

1857,[1] 1870,[2] and 1873.[3] Of these, only the three latter were charters in the strictly formal sense. The so-called "charters" of 1830 and 1849 were distinguished from many other charter amendments only by the relative importance of the changes they effected in the organization of city government. The act of 1830, although the first material modification in municipal structure since 1731, occupied a scant five pages in the session laws, slightly less than an act, placed by chance immediately after it, which incorporated the Livingston County Bank in the village of Geneseo. The amendment of 1849 was double the length; but from the standpoint of the make-up of the charter it attempted to do no more. Both assumed the royal charters and a mass of subsequent special acts; both were content to repeal in general terms whatever was inconsistent in prior law. The acts of 1857, 1870 and 1873 were charters in the formal sense that they repeated the grant of corporate existence. They were, moreover, at once more detailed and more inclusive. Yet they, too, failed to clarify the sources of the city's law. They did, it is true, expressly repeal the important charter amendments which had intervened since 1830. For the rest, however, they expressly continued the Dongan and Montgomerie charters "so far as the same or either of them are now in force;" and their silence implied the continuance of the consistent provisions of the body of law which had been gathered in 1813 and of uncounted special acts since that time. They stopped with the easy device of a blanket repeal of all acts or parts of acts inconsistent with their own terms.

The only mitigating device in the years between 1813 and 1880 was the occasional gathering and publication by the city government of the laws which were deemed of interest to it. At least four such collections were made.[4] Their inadequacy was two-

[1] L. 1857, ch. 446.
[2] L. 1870, ch. 137.
[3] L. 1873, ch. 335.
[4] *Laws of the State of New York relating particularly to the City of New York*, published by the authority of the Corporation. (1827). Same title, 1833; this, however, included as a new feature a list of the titles of provincial and state acts prior to 1813. *Compilation of the Laws of the State of New York, relating particularly to the City of New York, prepared at the request of the Common Council*, by Henry E. Davies (1855). Same title, 1862, prepared by David T. Valentine. Prior to the revision of 1813, in 1805, the Common Council had ordered the printing, along with the charter, of acts of the legislature which had vested additional power in the City.

fold. In the first place, they were mere compilations, crudely chronological and without even grouping by subject, let alone the elements of examination, comparison, and elimination. In the second place, in the nature of their city origin, they were quite without legal status. They were at the best a poor convenience. They facilitated access to the law but they did nothing to clarify it.

In the meantime special legislation affecting the City of New York was passed at a rate which, by 1880, had reached about thirty-five acts each year.[1] Nothing had effectively corrected the centrifugal tendencies which had long been at work on the sources of law relating to the city. The result was a confusion of which the highest court of the state complained in 1875: "It is scarcely safe for any one to speak confidently of the exact condition of the law in respect to public improvements in the cities of New York and Brooklyn. The enactments in reference thereto have been modified, superseded and repealed so often and to such an extent, that it is difficult to ascertain just what statutes were in force at any particular time."[2]

The New York City Consolidation Act of 1882.

Such was the statutory disorder at which the Consolidation Act of 1882 was aimed. First authorized in 1879,[3] the process was not completed until 1882. In practice, it involved two phases: compilation; then, revision. The execution of the plan was local. The corporation counsel was directed to appoint two persons who, with himself, were to prepare a compilation and revision for submission to the legislature of 1880. Only the compilation was ready at that time. It was printed in two volumes under the title, *The Special and Local Laws Affecting Public Interests in the City of New York,* and immediately given official status by an act which declared that "Said volumes shall

[1] *New York Senate Committee on Cities, Testimony,* vol. 5, Appendix, pp. 468-471 (1891).

[2] *In the Matter* of Kiernan (1875), 62 N. Y., 457, 459-60.

[3] L. 1879, ch. 536 (June 20), "An Act to provide for a compilation and revision of the laws of the State of New York affecting public interests in the City of New York." The commissioners were George Bliss, Peter B. Olney, and William C. Whitney, corporation counsel, *ex officio.*

be considered as containing presumptively all special and local laws. * * *"[1] The commissioners proceeded under further authorization by acts of 1880[2] and 1881[3] and, taking their compilation as the basis, reported a revision on May 23, 1881,[4] too late for legislative action. Their handiwork was passed on July 1, 1882, as "an act to consolidate into one act and to declare the special and local laws affecting public interests in the City of New York," to be known as the New York City Consolidation Act of 1882.[5]

The Consolidation Act was in a very real sense a charter.[6] It made no substantive changes, to be sure. Its authors, pointing to the fact that the legislative instructions under which they acted required that they should "not make any change in the meaning of existing laws,"[7] reported, "We have endeavored strictly to conform to this provision, though, of course, we have had sometimes to adopt one of two or more possible constructions of a

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[1] L. 1880, ch. 595 (June 26), the full text reading, "The volume entitled 'The special and local laws affecting public interests in the City of New York,' and printed by order of the Legislature of eighteen hundred and eighty, may be read in evidence and cited in any court or proceeding. Said volumes shall be considered as containing presumptively all special or local laws affecting public interests in force in the City of New York, on the first day of January, eighteen hundred and eighty, but this presumption shall not be considered as extending to special laws relating to any corporation (other than the mayor, aldermen and commonalty), or to any association or society, nor shall the insertion or omission of any law relating to any such corporation be construed as in any manner affecting the corporate existence of any such corporation or its possession of its franchises."

[2] L. 1880, ch. 594 (June 26), "An act to provide for a revision of special and local laws affecting public interests in the city of New York." It directed the appointment of commissioners by the corporation counsel; in practice, the same personnel continued

[3] L. 1881, ch. 572 (June 24), directing that, after making a preliminary report to the present session, the commissioners should continue their work, without further compensation, and submit the final revision at the opening of the 1882 session.

[4] Available as *Report of the Commissioners appointed under Chapter 594 of the Laws of 1880, with a Draft of the Revision of the Special and Local Laws affecting Public Interests in the City of New York* (1881). Printed at the expense of the City.

[5] L. 1882, ch. 410.

[6] See, as an example of judicial comment, *In re* McAdam, 7 N. Y. Supp., 454, 455 (1889), which remarks "Ch. 410 of the Laws of 1882 was virtually a charter of the City of New York."

[7] L. 1880, ch. 494.

statute or statutes."[1] In point of inclusiveness, however, it was more truly a charter than those which had gone before or those which were to follow. Neither the Greater New York Charter of 1897 nor the Amendatory Act of 1901 repealed it. It remains an important part of the statutory basis of the city's government. For this reason the problem that it left in regard to the completeness with which it repealed prior special legislation is postponed until, in the following chapter, the question of the present sources of the law relating to New York City is considered.

The City's Law Scatters Again.

Although the act remained, the principle that underlay the New York City Consolidation Act of 1882 was immediately compromised and almost disregarded. Within less than a decade a prominent commentator upon the charter could say, "When the statutory revision * * * was enacted in 1882, it was supposed that all laws thereafter passed, relating to New York City, would be in the form of amendments to the Consolidation Act. The legislature has, however, during the nine years since 1882, passed a vast number of laws, which, although relating to New York City solely, do not, in terms, amend any of the sections of the Consolidation Act. Many of these laws, however, supersede, modify or affect the provisions of the Consolidation Act."[2]

Why was a seemingly clear intent slighted and the charter allowed to unravel again?

Carelessness was a factor that it is almost unnecessary to mention. It is impossible otherwise to explain how it came that the act of 1884[3] which abolished the confirmation of the mayor's

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[1] *Report of the Commissioners appointed under Chapter* 494 *of the Laws of* 1880, *with a Draft of the Revision,* etc. (1881), p. iii.

[2] Ash, *New York City Consolidation Act, as in force in* 1891 (1891), p. iii.

[3] L. 1884, ch. 43. The Charter Revision Commission of 1907 remarked: "It is a singular commentary upon the looseness with which laws affecting the city, both good and bad, have been passed, that the two statutes last referred to, so fundamentally affecting the powers of the Mayor, were not in the form of amendments of the city's charter, but were special acts." The reference is to L. 1884, ch. 43 and L. 1895, ch. 11, the latter conferring unlimited power of removal during the first 6 months. Report of the Charter Revision Commission of 1907 to the Governor, Nov. 30, 1907, in *N. Y. Sen. Docs.*, 1908, vol. 2, no. 10, p. 24.

appointments, thus effecting one of the most vital changes in the form of city government during its whole history, was passed without reference to the Consolidation Act. This instance was outstanding but by no means single. Why, if it were not sheer carelessness, was the Consolidation Act disregarded in the terms of the statute of 1884[1] which made the comptroller elective, or the important act of 1890[2] which set up the commissionership of street improvements for the 23rd and 24th Wards and thus foreshadowed the borough system of administration? Such cases were inexcusable. Not less blameworthy, although more explicable, was the failure to relate to the Consolidation Act a much larger number of acts that dealt with very particular situations. These were in fact no more detailed than provisions which had already been placed in the Consolidation Act and which have been included in the charters since that time.

But the cause was deeper than carelessness. The revisers themselves had excluded from the Consolidation Act a mass of prior enactments which were very particular in scope and temporary in effect. The report of the commissioners in 1881 stated their policy:

> " * * * we have revised only what may be called the active laws; that is, those under which something remains to be done, either constantly or at some time or times; while we have omitted laws which were temporary in their purpose, and laws which, though the basis of the existing order of things—the foundation of existing rights—seem not properly the subject of revision, as nothing affirmative remains to be done under them. Such omitted laws embrace those which define the location of existing streets and parks and the lines of the waterfront, which authorize the issue of bonds where the authority has been fully exercised, which authorize the erection of buildings or public improvements which have been fully completed, which give the city its interest in real estate, and other similar acts. They, like many general laws of the State, are necessary to be referred to from time to time, but, as we

[1] L. 1884, ch. 73.
[2] L. 1890, ch. 545.

> have said, do not seem the proper subjects of revision. Indeed, a revision of some of them would tend to do harm rather than good."[1]

This was more than an invitation of example to subsequent legislatures. Temporary legislation necessarily continued, since the city's dependence on the state had not been altered; and the Consolidation Act contained no sub-divisions, no categories, no receptacles, to which such new legislation could easily be related.

The excluded temporary legislation was so in several senses. The quotation recited in the preceding paragraph has already indicated a distinction. It may be elaborated by a few illustrations from enactments after 1882 which were passed without reference to the Consolidation Act. (1) A few were entirely temporary, in the sense that, their operation having ceased, no continuing rights remained to vex the future. Such was the act of 1889[2] which authorized the completion of the north extension of the Metropolitan Museum of Art building. The examples were not numerous, however. Where private property is touched, a vestige of effect remains, however temporary may seem the operation of the statute, and a very large portion of the special legislation during this period of municipal government concerned public improvements and thus touched private property. (2) A larger number of the acts, therefore, were temporary in a less complete sense. Both their affirmative operation and their direct effects ceased, but certain consequences remained potential. Such was a statute of 1888[3] which extended the time for presenting damage suits arising in connection with a particular step in the expansion of the city's water supply system. No one could see what remote events might some day turn upon the validity of one of these actions. (3) In other instances, the direct effect persisted, although the affirmative action quickly terminated. Such was the act of 1886,[4] authorizing the use of a part of Riverside Park for the purpose of the Grant memorial; or, more clearly in

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[1] *Report of the Commission appointed under Chapter* 594 *of the Laws of* 1880, *with a Draft of the Revision,* etc. (1881), pp. iv-v.
[2] L. 1889, ch. 513.
[3] L. 1888, ch. 419.
[4] L. 1886, ch. 338.

point, that of 1888,[1] which permitted the construction of arcades over the sidewalks around Madison Square Garden.

That the illustrative acts which have just been cited were in some sense temporary, despite their permanent aspect, becomes clearer when they are compared with such a measure as that of 1887[2] which assigned jurisdiction over certain streets to the department of parks and which, for all its very particular scope, was as lasting as the general rule to which it made exception; or the series of acts[3] for the construction and maintenance of public baths; or the act of 1885[4] which regulated the height of buildings in New York City—all of which, it may be added, were carelessly passed without reference in terms to the Consolidation Act. In so far as the enactments that were left hanging in the air were really temporary in any of the three senses outlined in the preceding paragraph and did not merely seem temporary because of the narrow scope of their subject matter, the blame must be lodged upon the form of the original revision.

A third reason why legislation over-spilled the Consolidation Act was the passage of acts which ostensibly at least applied to all cities within certain population groups.[5] A favorite category was a population of 800,000 or over at the last decennial enumer-

[1] L. 1888, ch. 534.
[2] L. 1887, ch. 179.
[3] L. 1883, ch. 425; L. 1887, chs. 209, 227; L. 1888, chs. 402, 411; L. 1889, ch. 452, this last providing for an *ex officio* board of bathing-house commissioners.
[4] L. 1885, ch. 454.
[5] Examples were: (1) applicable to cities of 500,000 or over, L. 1886, ch. 151, regulating the hours of labor on street and elevated railways; (2) 800,000 or over, L. 1884, ch. 182, fixing compensation of patrolmen in the police department; L. 1884, ch. 234, fixing the compensation of uniformed members of the fire department; L. 1885, ch. 555, fixing the compensation of police surgeons and doormen; L. 1886, ch. 322, regulating the price of illuminating gas; L. 1887, ch. 565, fixing the salary of commissioner of docks; (3) 900,000 or over, L. 1887, ch. 218, fixing the compensation of chiefs of battalion in the fire department; (4) 1,000,000 or over, L. 1885, ch. 486, creating a relief fund in the police department; L. 1891, ch. 4, relating to rapid transit development and supervision; (5) 1,200,000 or over, L. 1888, ch. 539, providing regulations for the protection of consumers of coal; (6) 1,250,000 or over, L. 1895, ch. 1006 regulating procedure in street closing in a manner so fundamental that, since neither the charter of 1897 nor that of 1901 repealed this act, Ash, in his *Greater New York Charter, Annot.*, 4th Ed., prints the act in amended form, after the charter proper, as part of the charter in a more realistic sense. This act, it is fair to add, was treated as a special city act in that it was submitted to New York City and was accepted by it.

ation. Brooklyn alone was within hailing distance of the old City of New York.[1] In 1880 its population was 599,495, as compared with 1,206,299 in the Metropolis. The gap was closing, however, and their problems were becoming assimilated; by 1890 Brooklyn's population was 838,547. Even during the Eighties, therefore, it was not mere indirection to legislate for cities of 800,000 and over. But why, in 1887, fix the salary of chiefs of battalion in the fire departments of places of 900,000 and upwards? This smacked of a subterfuge that was as petty as it was legally unnecessary at a time when the state constitution did not prohibit special legislation for cities.[2] To legislate in general terms on such a matter as rapid transit was doubtless wholesome; here the problem was at once fairly distinct from the routine of city business and a question for a long view ahead. In such cases it might pay to risk the element of confusion that is inherent between general and special municipal legislation.[3] But to regulate the minutiae of salary scales by legislation that was ostensibly general only added complications without bringing the cities one jot nearer to a municipal code.

As a result of these influences—carelessness; the difficulty of articulating temporary legislation; the formally general scope of

[1] In 1880, Buffalo, the third city, had only 155,134 inhabitants; the combined populations of the 9 largest municipalities in the state, outside the metropolis and Brooklyn, was 491,369. It was not until 1920 that Buffalo passed the half-million mark, and then by a few thousands only.

[2] The constitutional classification of cities and the provision of the local suspensory veto on special legislation were added in the new Constitution of 1894, Art. XII, sec. 2. The Constitution of 1846, aside from prohibiting the incorporation of villages by special act (Art. of Amendment III), expressly permitted special legislation for city purposes: "Corporations * * * shall not be created by special act, except for municipal purposes" (Art. VIII, sec. 1). The only express restriction was: "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title." For a further discussion, see *infra,* pp. 51, 70. The New York legislature may have been influenced by the example of states which, in the face of constitutional requirements of general legislation, were beginning to employ a classification of cities; among these states were Pennsylvania (Const., 1873, Art. III, sec. 7) and New Jersey (Const. Amendment, 1875, Art. IV, sec. 11). The principal reason for the enactment in New York State prior to 1894 of laws ostensibly applicable to groups of cities, however, was probably the fact that special legislation was being attacked and the legislature was instinctively utilizing whatever changes in form might serve to disarm the criticism.

[3] For a discussion of this problem, see *infra,* p. 59.

other measures—the cohesion which the Consolidation Act brought to the laws concerning New York City was in large part destroyed. Why did the charters of 1897 and 1901 fail to correct the disintegration?

The Greater New York Charter Fails to Integrate the Law Anew.

The failure of the Greater City Charter to centralize the law anew was the natural consequence of the circumstances under which its authors worked. First, they approached their task in the cautious spirit that seems to have infected charter revisers from the beginning. Second, unusual difficulties, and additional grounds for conservatism, inhered in the task of combining under one body of law several municipalities, each with its own cherished powers and its own obscure legal history. Third, shortage of time hurried these cautious men through their complicated problem.[1]

The circumspection of the Greater New York Commission was recalled in remarks of Seth Low, one of its members, before the New York Constitutional Convention of 1915. Alluding to the process by which the charter developed, he said:

> "The result is not only that the charter of New York is a very bulky document, but it is estimated that approximately ten thousand laws affect the administration of the City of New York and its powers, surrounding the charter, so that we are not dealing with a charter that has been made out of hand * * * but we are dealing with a charter that is the growth of two hundred and fifty years, and I venture to think that the gentlemen of this convention will feel as I do, that it is a tremendously serious proposition

[1] The secretary of the Council of the New York City Club remarked later: "The enactment of the charter of Greater New York of 1897 is a matter of recent history * * *. It is hardly necessary to recall the insufficiency of the sum of money provided by the act creating the commission; the hurried character of much of the work done, especially at the last; the employment of different men to draft different parts of the charter, each without knowledge of what the others were doing; and the unseemly manner in which the bill was hurried through the legislature, despite its many serious and obvious weaknesses," J. W. Pryor, in *Rochester Conference for Good City Government,* 1906, p. 129.

> to suggest that a charter which is a growth like that should be torn up by the roots and the city compelled to start over again."[1]

Small wonder, then, that the logical opportunity offered at the formation of the Greater City was deliberately neglected.

> "Then, if ever, was the time to provide an entirely new charter for the City of New York; but that commission, like its predecessors, declined to undertake that great responsibility. Possibly something of that decision was due to pressure of time, but we were restrained, sir, by the recognition of the fact that we were dealing with a growth, not with a document that was given out of hand by the Legislature. To illustrate the significance of the situation, let me call the attention of the convention to the fact that when the corporation counsel of New York City was asked to prepare an amendment to the charter that would permit the city to establish a central purchasing bureau, it was necessary to provide for the repeal or modification of approximately one hundred different laws—approximately, if not exactly."[2]

To this historical reason for caution was added the legal argument for a detailed charter. The Committee on Draft, in their report to the Greater New York Commission on December 24, 1896, thus envisaged their problem.

> "The established rule of law which prescribes that a charter granted to a municipal corporation must be construed so strictly that nothing may pass by bare inference, but every substantial power must be found in the express terms of the grant, has added greatly to the labors of your Committee. It would have been comparatively easy to have drawn a charter in general terms, with concise sections, comprehensive in character. This, however, would have left to the varying and uncertain rulings of the courts

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[1] *New York Constitutional Convention*, 1915, *Revised Record*, pp. 1964-5.
[2] *Ibid.*, p. 1965.

> the extent and sufficiency of the powers conferred, and would have led to special legislation, when anything new or doubtful pertaining to the general grants arose for municipal action. To confer upon the Greater New York a charter which should render the city self-governing, it became, therefore, prudent and necessary to endow it, in general and in detail, with every right, power and privilege essential to municipal independence, subject to the sovereignty of the State. This method was further enjoined by the chief duty devolved upon the Commission, which is to effect a consolidation of the various municipalities so that there may be no break or jar in the unity and integrity of the single corporation, and no lack of power or supremacy in its central government."[1]

The result was natural. The charter of 1897 was long and detailed. But it did not possess the exhaustiveness that might have compensated for its prolixity. It was by no means as inclusive of New York City legislation as was the Consolidation Act of 1882, upon which it was largely based.[2] Instead, it fell back upon a three-fold expedient. By brief saving clauses,[3] it continued all consistent prior law. Blanket fashion, it repealed whatever was inconsistent with itself.[4] By a few broad phrases, it gathered up, for possible future use, whatever was compatible among the powers and duties of the various local governments which Greater New York supplanted.[5]

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[1] Report of the Committee on Draft of Charter, to the Greater New York Commission, December 24, 1896, the quotation being taken from the reprint as given in Birdseye, *The Greater New York Charter* (1897), p. xiii.

[2] The drafters of the Greater City Charter did not indicate, officially, the derivation in the Consolidation Act of each section of the charter. That task has since been performed by private commentators; see Ash, *The Greater New York Charter, annotated* (4th ed., 1918), pp. xxxvii-lxv; or Birdseye, *The Greater New York Charter* (1897), pp. xli-xlv. Slightly less than one-third of the sections of the Consolidation Act were carried into the charter of 1897. Ash, *op. cit.*, in Appendix I, pp. 1243-1315, selects and reprints sections of the Consolidation Act deemed to be still in force.

[3] L. 1897, ch. 378, sec. 1609.

[4] *Id.*, sec. 1608.

[5] Secs. 1, 3, 4, 5, but especially, for the city as a whole, 1615, 1617, and, for particular agencies, 41, 1586, 204, 274, 358, 517, 547, 616, 886, 1058, 1168. For further comment, *infra*, p. 52-56.

Charter Revision in 1901 *Leaves the Situation Unchanged.*

The Charter Revision Commission of 1900 did not attempt to go back of this. Required to report in December of the year of its creation, with only $25,000 at its disposal and oppressed by haste throughout, it was not disposed to reopen problems of which the Greater New York Commission had stopped short and which it had glossed over. Indeed, the fruit of the Charter Revision Commission is perhaps more accurately described, in a term often applied to it, as "the Amendatory Act of 1901" than as a charter. The report of the Commission boasted of no drastic intent:

> "In preparing its recommendations for legislation it became necessary for the Commission to determine in the first place whether it would undertake the preparation of a charter different in form from the existing charter or whether it would embody its recommendations in the form of amendments to that charter. But the limited amount of time at the command of the Commission has rendered it impossible to do more than to deal with questions of substance; and it has seemed to the Commission that by presenting its views in the form of amendments to the charter as now existing, the legislature and the public generally would perceive more clearly what changes are proposed."[1]

The specific repealers[2] which were listed at the close of the bill were confined to sections in the Greater City Charter. As for the rest, the broad saving and repealing clauses of 1897 were repeated almost verbatim.[3]

Special Laws Which Have Not Amended the Charter.

Not only did the revisions of 1897 and 1901 fail to integrate all the law relating to New York City, but the passage of special

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[1] *Report of the Charter Revision Commission to the Governor of the State of New York*, Dec. 1, 1900, p. 3.

[2] L. 1901, ch. 466, Section Two, referring to the First Schedule appended to the act.

[3] *Id.*, sec. 1608 (repealer); secs. 1609, 1610 (saving clauses).

acts that did not in terms amend the charter continued unabated. Some of these expressly amended those parts of the Consolidation Act of 1882 which, although active law, had not been included in the Greater City Charter. More, however, related to neither charter nor Consolidation Act. The latter situation was natural. The reasons for the passage of special legislation outside the charter were essentially those which, as an earlier paragraph has indicated, had caused New York City legislation after 1882 to scatter beyond the confines of the Consolidation Act. Although, as before, many of the unrelated statutes touched matters already treated in the body of the Greater City Charter, to which, by implication only, they added qualifications or exceptions or even outright repeals, the larger number were temporary or were so very restricted in application as to seem temporary. Neither charter nor Consolidation Act provided convenient handles to which to tie them.

The extent of the disunion in the sources of city government thus introduced may be judged from a few figures. The Ivins Commission, reporting in 1907, found that 650 special acts had been passed since the advent of the Greater City Charter, which did not amend it.[1] Six hundred and eighty have been enacted since, at the sessions of 1908 to 1921, inclusive.[2] Comparison reveals still more clearly the frequency of the practice. Since the enactment of the 1901 charter, through the legislative session of 1921, 550 formal amendments have been incorporated in it; whereas, in the same period, there have been 1,002 special New York City acts passed without reference to it. Of the measures introduced between 1904 and 1921, inclusive, which have peculiarly involved the Metropolis, 2,545 have proposed to amend the charter; 5,220 have not referred to the charter.

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[1] Report of the Charter Revision Commission of 1907 to the Governor of the State of New York, Nov. 30, 1907, in *N. Y. Sen. Docs.*, 1908, vol. 2, p. 10.

[2] For the details and sources of this and the following figures, see the table in Appendix. Discrepancies are likely between various computations of the number of special acts which do not amend the charter, because an element of judgment is involved in determining whether certain acts are to be regarded as special and peculiar to the city in question; any total on this point is an approximation only.

Adverse Comment on the Condition of the Statutory Sources of the City's Government.

Objections have not been lacking. The draft offered by the Greater New York Commission was vigorously criticised from the standpoint of its underlying form by a special committee of the Association of the Bar of New York City. "The proposed charter of the Commission," they reported to the Association on March 9, 1897,[1] "is not a charter in any proper sense, and it is not a code. It is an imperfect compilation and to some extent a condensation of laws affecting the territory of the proposed Greater City." More specifically, they objected to indiscriminate reenactment of existing law, and to the blanket clauses which continued consistent legislation. They deplored the failure to use "the golden opportunity, not likely to be again afforded for a long period, to give these great communities an improved, clear, simple and harmonious system of local government."[2] The report led to a resolution of the Association of the Bar at its meeting on March 9:

> "that in the judgment of this association the enactment of the proposed body of law contained in that charter would give rise to mischiefs far outweighing any benefits that may reasonably be expected to flow from it; that ample opportunity should be given for thorough revision, simplification, and reduction in the form of the proposed charter; and that the true welfare of the communities to be affected by the proposed act will be best consulted by postponing the period at which consolidation shall take effect and by referring the bill for redrafting before its enactment into law."

Much the same criticism was levelled at the Amendatory Act of 1901. The New York Chamber of Commerce, in a letter pre-

[1] The committee was appointed January 12, 1897, with W. H. Peckham as chairman. Its report was printed as a pamphlet, along with the resolutions on the subject at the meeting of the Association of the Bar of New York City of March 9, 1897.

[2] On the constructive side, the committee suggested the more extended use of the device employed in connection with the building code, in the 1897 charter. See *infra*, p. 97 *et seq.*

pared by a special committee and addressed on October 20, 1900, to the Charter Revision Commission,[1] stressed defects of form in the proposed charter itself, before turning to the structural aspects of city government. They admitted that under the circumstances, if the Commission allowed itself to be forced into making a report within the time allowed, it could not avoid cutting the knot by the use of general repealing and saving clauses. In this expedient, however, endless perplexities inhered. The examination of prior legislation was, the committee recognized, a heavy task. "Lawyers of high standing represent to us that this necessary provision involves almost insuperable difficulties and that it would require months of investigation to find out what is consistent and what is inconsistent." Better, however, this trouble at once than later; the Commission, they recommended, should ask for more time and money.

A decade later these objections to the form of the charter were forcefully summed up in a brief[2] submitted on May 19, 1911, by the Committee on Amendment of the Law of the Bar Association, on the occasion of a joint hearing of the legislative committees on affairs of cities regarding the proposed "Gaynor Charter." Although pointed immediately at the mooted draft, destined to

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[1] This memorial is available as a printed leaflet, entitled, *Letter from the Chamber of Commerce to the Charter Revision Commission, recommending Certain Changes in the Charter,* October 20, 1900. The subcommittee from the Executive Committee of the Chamber, which prepared it, consisted of C. S. Smith, J. K. Todd, and G. F. Peabody.

[2] This brief, which was submitted without oral argument, was reproduced in the bound typewritten transcript of the stenographic report, entitled, *Hearings before the Joint Committee on Cities of the Senate and Assembly,* 1911, vol. 2, pp. 664-82. The brief itself was entitled, "Memorandum on Senate Bill 1029, Int. No. 907." Its first and longest section is dedicated to the question of charter form; its concluding sections, pp. 676-82, take up other alleged defects. Perhaps the antipathy which the authors of the brief shared with other civic agencies to the auspices and the suspected intent of the proposed charter and to certain structural changes that it involved strengthened their hands in indicting it on a charge of which every revision since 1882 had been guilty. The brief did add, however, that "as a rule the proposed law is well and clearly expressed, and if it were complete in itself it might well receive our commendation in this respect" (p. 675). On July 13, a spokesman of the legislative committees on affairs of cities announced that a schedule of laws specifically repealed had been introduced in the charter draft in accordance with the suggestions of the Bar Association. *Brooklyn Daily Eagle,* July 13, 1911.

defeat later in 1911, the criticism was equally applicable to the existing charter, since no material changes were proposed either in the repealing and saving clauses or in the form and content generally. The brief summarized the unfortunate short-cuts taken by commissions of 1896 and 1900. "The result has never been satisfactory. The existing charter is about as far as possible from being the instrument which a proper charter should be, and is exceedingly defective as a law."[1] That the error existed, would not excuse, but aggravate, the fault of repeating it in any subsequent revision.

> "It is manifest that a law which is merely a new compilation will only add to the existing confusion of the various statutes relating to the municipal government. Any new instrument ought to be so carefully prepared and be drawn with so much knowledge of the existing law, that it will be complete in itself and will not necessitate the examination of all prior statutes which are still on the statute books unrepealed and which run back to the year 1784. The bill in question does not do this. On the contrary, it will simply add to the present confusion. It has apparently been prepared with the idea of shortening the provisions of the present charter and this it does. But it does this only by the process of omitting certain provisions which still remain law, and which are to be found only through an examination of the existing charter and other statutes."[2]

The existing charter, declared the authors of the brief, has presented uncertainties enough, and they continued:

> "Such a condition of affairs should not be tolerated. The charter of the City of New York should be complete in itself. Within this code, any citizen should be able to find the provisions and the statutes relating to the municipality. He should not be called upon to wade through a

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[1] *Ibid.*, pp. 675-6.
[2] *Ibid.*, pp. 666-7.

century of previous legislation for the purpose of determining what the law on a particular situation is. The objection to the present charter, that it consists of layer upon layer of legislation, the meaning of which can only be definitely determined by a judicial interpretation, will be merely emphasized by the adoption of a new charter without specifically repealing the provisions. It will be but another encrustation, not a codification."[1]

A Consolidation of Local Laws Advocated.

Despite such criticism, the condition of the statutory sources of New York City's government has remained unrectified.[2] Explanatory amendments and judicial or administrative rulings have gradually cleared up many questions of consistency and inconsistency which were once doubtful. In recent years the special acts affecting New York City have been listed and, at last, digested. A more ambitious scheme for recodification dwindled to these partial measures.

The larger project was advocated by the Citizens' Union of New York in a petition to the legislature in 1910, which said in part, "In order to discharge the task properly, all these provisions of law should be collated, coordinated and simplified so as to declare plainly, in one homogeneous statute, the law governing the city and all its officers and departments in all their functions, and in their relations to each other and to the public. Necessary changes in the law can then be incorporated in the

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[1] *Ibid.*, p. 669.

[2] It seems to have been the intention of the Commissioners of Statutory Revision to revise the New York City Consolidation Act; it was listed as one of 31 projects in the Report of the Commissioners, etc., April 5, 1900, in *N. Y. Ass. Docs.*, 1900, vol. 4, No. 86, pp. 9-10. The idea was not carried out, however. Report of the Committee to Report to the Legislature concerning the Condition of the Statutes and Laws of this State, January 21, 1903, in *N. Y. Ass. Docs.*, 1903, vol. 1, No. 4. The Board of Statutory Consolidation, created by L. 1904, ch. 664, reported in 1905: "Special private and local statutes have been left for later consideration." Report of the Board, etc., in *N. Y. Ass. Docs.*, 1905, vol. 11, No. 55.

charter as an integral part of the whole. The magnitude of the task is apparent."[1]

Codification by a small, expert staff, they argued, should precede any attempt to alter the substance of the law or the organization of the city government.

The *debacle* of the "Gaynor Charter" in 1911, reducing finally to futility five years of continuous effort at revision, opened the opportunity for a definite step. A committee of the Citizens' Union, perfecting its recommendation in December, prompted the introduction at the legislative session of 1912 of a bill[2] which proposed to appropriate $20,000 to the Board of Statutory Consolidation with which to prepare a consolidation of the laws relating to territory within the City of New York. Successful in the Senate, it reached the order of final passage in the Assembly but was suddenly recommitted and lost. Its purpose was partially rescued by eleventh-hour insertion in the annual supply bill of an item that carried $10,000 for the preparation, under the direction of the Senate committee on affairs of cities, of "a digest of all independent and collateral statutes affecting in any way the City of New York, and each of the municipalities comprised

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[1] *Searchlight*, December 20, 1913, vol. 3, No. 6, p. 3. In quoting their petition of 1910, the editors added: "The confusion of the state of the law relating to the city has increased with every year until revision has become an absolute necessity. The first step in the work should be the consolidation of all the existing laws relating to the City. This is a necessary preliminary of charter revision." The same opinion was expressed by a lawyer with unusual experience in the framing of legislation: "* * * before any thorough revision of our city charter can be adopted the great mass of local legislation inside the charter and outside the charter relating to the city government must be thoroughly studied and consolidated. If this mass of local legislation is not got under control it will torment the proponents of any new charter and in all likelihood defeat their efforts." Thomas I. Parkinson, of the Legislative Drafting Bureau of N. Y. C., in *Proceedings of the Academy of Political Science*, April, 1915, vol. V, No. 3, pp. 230-1.

[2] S. Pr. No. 1226, S. Int. No. 1081, introduced March 14 by Senator Wagner, Democratic Leader (*N. Y. Sen. Jour.*, 1912, p. 598); passed Senate without recorded dissent, March 20 (*ibid.*, p. 753); Ass. Rec. No. 245; reported, amended slightly, and made special order, March 23; (*Ass. Jour.*, 1912, p. 1621); recommitted to Committee on Rules by *vive voce* vote, March 28 (*ibid.*, p. 2035). *The Report of the Committee on Legislation of the Citizens' Union for the Session of* 1912, p. 5, remarked: "Some who had been engaged in preparing, for large compensation, various political charter revisions, promoted opposition to the bill."

within or consolidated to form said city, not contained in the Greater New York Charter."

Even this restricted provision fell, without explanation, before the Governor's power to veto details in appropriation bills. When finally realized in 1914, by an item in the annual supply act of that year,[1] the plan was similarly curtailed and provided for no more than a digest. Subsequent legislation[2] nearly doubled the original allowance but did not broaden the purpose.

A Digest Compilation Finally Effected.

The resulting *Digest of Special Statutes Relating to the City of New York*[3] has performed a task akin to compilation for the first[4] time since 1880. It differs in several respects from the col-

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[1] L. 1914, ch. 530, under the heading, "Board of Statutory Consolidation" (p. 2305): "For the preparation, under the direction of the Chairmen of the Senate and Assembly committees on affairs of cities, of a digest of all independent and collateral statutes affecting in any way the city of New York and not contained in the Greater New York Charter, $10,000, to be paid upon the certificate of the chairmen of said committees."

[2] L. 1915, ch. 726, under heading, "Board of Statutory Consolidation" (p. 2553), $5,000, for deficiency; L. 1921, ch. 176, Part II of Appropriation Act (p. 680-1), $4,231.17, for deficiency; L. 1922, ch. 397 (Supplemental Supply Act), at p. 833, $5,500 (appropriated in the name of the N. Y. C. Charter Commission for printing, etc., in connection with "digest of independent and collateral statutes affecting in any way the City of New York").

[3] The full title and sub-titles being, *Digest of Special Statutes relating to The City of New York and each of the Municipalities comprised within or consolidated to form said City, and not contained in the Greater New York Charter from February* 1, 1778, *to January* 1, 1921—*Together with a List of Corporations Incorporated by Special Statutes within the Territory now included in the Territory embraced within Greater New York* (October 1, 1922). Although begun and executed under the auspices indicated in a preceding note, the final appropriation for printing was authorized in connection with the New York City Charter Commission and the digest describes itself as having been "edited and printed under the supervision of the New York City Charter Commission."

[4] In 1911 (pursuant to L. 1910, ch. 513, and L. 1911, ch. 192) the Board of Statutory Consolidation prepared *The Statutory Record of Unconsolidated Laws, being the Special, Private and Local Statutes of the State of New York, from February* 1, 1778, *to January* 1, 1912, in two volumes. A third volume, *Supplement to Statutory Record,* etc., issued in 1918 (pursuant to L. 1917, ch. 325, and L. 1918, ch. 424), covered the period 1912-8. Not only was it confined to the citation of chapter and abridged titles, but the arrangement was starkly chronological. Nowhere does it assem-

lection known as *The Special and Local Laws Affecting Public Interests in the City of New York in force on January* 1, 1880.[1] (1) Whereas the earlier document was in fact a compilation, reprinting the full text of the acts themselves, although sometimes separating the contents of single measures found to relate to several subjects, the new digest attempts only to set forth in a few lines the essential provisions of each statute that it lists. (2) Whereas the compilation of 1880 assembled the material under a number of broad topics, with secondary attention to the order of enactment, the digest is strictly chronological, and involves the topical arrangement only in the headings of its detailed indices. (3) The digest is broader, however, in that it lists the statutes which have been specifically repealed, as well as those which, whether obsolete or not, have never been specifically repealed. (4) It is broader, furthermore, in that it explores the legislative history of the many local governments which have at some time operated within the area now covered by Greater New York City. The number of communities treated in the section of the digest which is given to unrepealed law runs over thirty. "To locate the settlements, villages and towns that were consolidated to form Greater New York," say the authors of the digest,[2] "it was necessary to consult old maps, charts, gazetteers and histories. If any inaccuracies have crept into this volume they may be attributed to this phase of the work." (5) It is broader, finally, in the sense

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ble citations to all of the statutes which have concerned New York or any other municipality, let alone group these under the various aspects of city business. Charter amendments, in the formal sense, might be traced by examining the lists under each past charter, but the masses of special legislation outside the charter could be located only by combing the entire contents of the *Statutory Record.* The task is partly performed in the *Official Index to the Unconsolidated Laws of the State of New York,* 1778-1919 (published, pursuant to L. 1917, ch. 332, as N. Y. Leg. Doc., 1920, No. 127). Nearly one hundred pages are given to New York City legislation, the classification being by subjects and the arrangement alphabetical. But the document is "an index only of original laws. It is not an index of matters added by amendatory acts. The year and chapter of an original law having been discovered by means of the Index, its subsequent history must be traced by the *Record.*" Furthermore, the legislation affecting municipalities since merged in the metropolis is indexed under many separate headings. Neither the *Statutory Record* nor the *Index* has furnished a convenient compilation of the statutory sources of the City's government, even in the terms of mere titles and chapter numbers.

[1] See *supra,* p. 8; also *infra,* p. 38.

[2] *Digest,* etc., pp. iii-iv.

that it lists, under an alphabetical arrangement and with chapter citations but without digesting, the corporations which have been incorporated by private statutes within the territory now embraced in Greater New York.

With revision and consolidation the authors of the digest could have nothing to do. The terms of the legislative authorization under which they worked restrained them from even considering the laws which have comprised the charter in the formal sense. They were not asked to resolve the inconsistencies so often implicit between laws which do not expressly involve each other. One of the most valuable features of the digest is the indication, in connection with the acts not specifically repealed, of the subsequent measures which have "affected" them; but the relationships which are cloaked by the word "affected" and which so often turn on a difficult practical judgment are not stated. It is only here and there that the digest undertakes to describe as temporary and obsolete statutes which have never been expressly repealed. Although valuable as it stands and although a necessary step in any movement for the consolidation and revision of the bodies of law affecting New York City, the digest does no more than to facilitate access to the scattered statutory sources of New York City's government.

CHAPTER II.

THE SOURCES TODAY—SPECIAL CITY LAWS.

Provisions for Repeal in the Charters of 1897 and 1901—Examples of Non-Repeal by Omission—The Present Charter in Relation to Laws Prior to 1882—Inconclusiveness of Express Repealers in Connection with the Consolidation Act—Conflicting Evidences of Legislative Intent—Cases that Point to the Survival of Omitted Legislation—Cases that Point to the Repeal of Omitted Legislation—The Doctrines of Codification Consulted—The Legislative Heritage of Communities Absorbed in Greater New York—The Royal Grants as Continuing Sources of City Government.

Where, then, is the law of New York City today?

The question comprises a complex of problems which the cautious but hurried and knot-cutting method of charter revision, reviewed in the preceding pages, has rolled up around the Consolidation Act of 1882 as an axis. These problems may be divided into two groups: (1) the problem of unrepealed legislation; (2) the problem of overlapping special and general legislation, especially the General City Law and the General Municipal Law, but involving also the systems of state law that govern the administration of justice, civil service, education, utilities, etc. The present chapter, in treating the first of these groups of problems, must consider unrepealed legislation applicable to the old City of New York, the legislative heritage that came to the Greater City from the communities merged in it, and, finally, the ancient royal grants as possible sources of city government today. The question of unrepealed legislation applicable to New York City naturally claims the major share of attention. It resolves itself into two phases: (1) the relation of the charters of 1897 and 1901 to prior legislation omitted by them; (2) the relation of the Consolidation Act of 1882 to the earlier New York City laws omitted by it.

Provisions for Repeal in the Charters of 1897 *and* 1901.

The Greater New York Charter was not intended to exhaust the special laws applicable to New York City. The policy that

characterized both the original charter and the Amendatory Act of 1901 in this regard has already been indicated. A recital of this exact provision is now in place. Prior legislation, in so far as it was inconsistent, was repealed by the sweeping clauses of sec. 1608:

> " The act of the legislature of the State of New York, passed July first, eighteen hundred and eighty-two, known as the New York City Consolidation Act of eighteen hundred and eighty-two, and acts amendatory thereof, and supplemental thereto, and other acts of the legislature of the State of New York now in force relating to or affecting the local government of the City of New York, as heretofore constituted, are hereby repealed so far as any provisions thereof are inconsistent with the provisions of this act, or so far as the subject matter thereof is revised or included in this act, and no further. So far as the provisions of this act are the same in terms or in substance and effect as the provisions of the said Consolidation Act, or of other acts of the legislature now in force relating to or affecting the municipal and public corporations, or any of them herein united and consolidated, this act is intended to be not a new enactment, but a continuation of the said Consolidation Act of eighteen hundred and eighty-two, and said other acts, and is intended to apply the provisions thereof as herein modified to The City of New York as herein constituted, and this act shall accordingly be so construed and applied."

On the other hand, sec. 1609 (making explicit what otherwise would have been understood in accordance with the normal rules of statutory construction) declared that omission should not be construed to mean repeal. It said:

> " The mere omission from this act of any previous acts or of any of the provisions thereof, including said Consolidation Act of eighteen hundred and eighty-two, relating to or affecting the municipal and public corporations or any of them which are herein united and consolidated, shall not be held to be a repeal thereof."

Such were the provisions that determined the relation between the charter of Greater New York and the masses of prior legislation.

What of the relation of the Amendatory Act of 1901 to the original Greater New York Charter? The clauses just quoted were identical in both documents. The latter enactment, however, contained new provisions (Section Two, so-called, the body of the revised charter being Section One) that specifically repealed 156 sections in the charter of 1897. An attached schedule designated these by number and by title. This repealer was accompanied by the usual qualification intended to protect actions or proceedings already pending under the old law. In addition it was expressly stated that in so far as the revised charter repeated the substance of the old, whether found in repealed sections or not, it should be construed as a continuation merely and not as new legislation. The language of Section Two at this point recited:

> "The provisions of this act, so far as they are substantially the same as those of laws existing on December thirty-first, nineteen hundred and one, shall be construed as a continuation of said laws, modified or amended according to the language employed in this act, and not as new enactments, and shall be applicable to all matters contained in the several sections of the said chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven which are repealed, modified or amended by this act. References in laws not repealed to provisions of law incorporated into this act and repealed shall be construed as applying to the provisions so incorporated."

The Amendatory Act of 1901 was silent regarding the disposition of those parts of the 1897 charter which it did not specifically repeal and which it omitted altogether; except in so far as the question was covered by sec. 1609,[1] adjustments were left to implication and to the normal rules of statutory construction.

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[1] O'Connor *v.* the City of New York (1906), 51 Misc., 560, aff'd by memo. 120 App. Div., 875, involved the question of the repeal by omission from the revised charter of sec. 262 of the charter of 1897. In taking up the problem, the court alluded at once to sec. 1609.

These repealing and saving clauses made the legislative intent clear, and left only the endless questions of detail that inhere in uncovering relevant provisions in earlier law and in determining whether such provisions are or are not consistent with the charter provisions involved in any contemporary situation. In the latter sense, the perplexities have been very real. The difficulty in discovering the effect of new law upon old law, it must be added, was aggravated by clauses of the charter which, at several points, injected questions of degree. Does a new provision sufficiently cover the subject-matter of the old to accomplish its supercession as matter "revised or included" in the charter? Is a new provision, although different in terms, sufficiently near "in substance and effect" to the old law to be construed as a continuation of it rather than as legislation *de novo?* To these problems, invited by the language of sec. 1608, a third was added by certain phrases in sec. 1610.[1] This section was written into the charter as a legislative short-cut in the task of combining several municipalities. It declared that active provisions of law applicable to the old City of New York should be extended to the whole of the Greater City. Two qualifications were attached; the provisions must be of a "general and permanent" character; they must not be "in their nature locally inapplicable to other portions of the city." All three questions have been more than a matter of consistency between the formal terms of new and old laws; they have

[1] Sec. 1610 was identical in both L. 1897, ch. 378, and L. 1901, ch. 466. Its full text is as follows: "All of the provisions of all acts of the legislature of the state of New York, including said consolidation act of eighteen hundred and eighty-two, of a general and permanent character, relating to the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York, in force at the time this act goes into effect, which are consistent with this act and its purposes, and which are not revised and included in or the subject matter thereof covered by this act, are hereby extended to The City of New York as herein constituted, so far as they are consistent with this act, and are not in their nature locally inapplicable to other portions of the city than the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York. And the provisions of law thus extended to The City of New York as herein constituted shall apply to said city throughout its whole extent, anything to the contrary notwithstanding contained in the charter of any of the municipal or public corporations or laws relating thereto, which are by this act united or consolidated with the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York."

involved the measuring of degrees and have required judgments regarding the practical effects of legislation.

Examples of Non-Repeal by Omission.

In view of the explicit saving clause of sec. 1609, no doubt could exist regarding the continuing force of omitted legislation where the omission was complete in the sense that the charter contained no provisions impinging upon the subject-matter of the earlier law. Such situations, however, can arise but seldom. The details of the Greater New York charter ramify into so many fields and in origin touch so many of the pre-existing statutes that it would be difficult to find a special New York law on a topic wholly irrelevant to material now in the charter. This view, which may be deduced from the nature of the charter, seems to have partial confirmation in the absence of cases in point. Where the question of non-repeal by omission has actually been raised before the courts, it has been in connection with laws that have involved subjects treated in the charter.

An illustration is afforded in People *ex rel.* Pumpyansky *v.* Keating,[1] which may be regarded as the leading case in point. The question here was the repeal or non-repeal of a statute of 1896[2] that had authorized the municipal assembly to grant permits for stands beneath the stairs of elevated railroad stations. The charter of 1897 omitted this provision from the enumeration of the powers of the local legislative body. Yet the charter was not wholly silent on the matter at issue. In clauses[3] taken largely from the act of 1896, it empowered the municipal assembly, among other things, "to regulate the use of streets * * * and to prevent encroachments upon and obstructions to the same * * *," and to this grant it attached the following condition: "* * * but they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street

[1] (1901) 168 N. Y., 390, over-ruling 62 App. Div., 348.
[2] L. 1896, ch. 718, amending sec. 86, L. 1882, ch. 410, as previously amended by L. 1888, ch. 115.
[3] L. 1897, ch. 378, sec. 49, subd. 3.

or sidewalk, except the temporary occupation thereof, during the erection or repairing of a building on a lot opposite the same, nor shall they permit the erection of booths and stands within stoop lines, except for the sale of newspapers, periodicals, fruits and soda water, and with the consent in such cases of the owner of the premises." The Appellate Division was impressed by the fact that the clauses just cited were "a revision of the matter contained in the act of 1896 and a re-enactment of a portion of such act, but the Legislature has left out of it that portion of the Consolidation Act which related to stands and booths under stairways of the elevated railroad structures." On this basis the Appellate Division held that the omitted part of the act of 1896 had been repealed. The Court of Appeals, however, over-ruled the contention of the intermediate court and held that the city had not lost the power in question.

Indeed, far from upholding repeal by omission where the subject-matter is in any way covered by the terms of the charter, the construction adopted by the courts has favored giving effect to omitted legislation if it is possible to do so. In Baker *v.* The City of New York,[1] for example, the point at issue was whether, in face of the fact that the charter provided for the appointment of stenographers by the coroners and said nothing about compensation for transcripts, the provisions of prior law regarding fees still applied. The Court said:

> "The provision of the charter that the coroners shall have stenographers is in no way inconsistent with the provisions of the Consolidation Act. The charter does not as fully describe the duties of such a person as does the Consolidation Act, nor does it regulate his salary. It was not the purpose, evidently, of the framers of the charter, to revise and collate all the provisions which were in existence at the time relating to the office and to the powers and duties of coroners. The intention was to recognize in a general way the existence of such offices, leaving the regulation of their powers and duties to be governed by the earlier and more ample provisions on that subject in the Consolidation Act."

[1] (1900), 67 N. Y. Supp., 814, 816; 56 App. Div., 350.

By the same reasoning a provision of the charter stipulating that clerks of commissioners in condemnation proceedings should be paid out of certain funds was held not to repeal a prior statute which required that the clerks be designated by the corporation counsel.[1] These examples illustrate the manner in which the courts have resolved in favor of prior legislation the doubts that must frequently arise in connection with the provision found in the general repealing clause of the charter,[2] which states that such legislation is to be regarded as repealed, not only in so far as it is inconsistent, but in "so far as the subject matter thereof is revised or included in this act." This interpretation is allied to, and sympathetic with, the principle stated in the concluding phrases of the repealing clause itself and repeatedly applied,[3] under which the charter is regarded merely as a continuation of the Consolidation Act and other prior legislation wherever, although differing perhaps in terms,[4] they are the same "in substance and effect." Therefore even unwritten practices of government before 1897 may guide the interpretation of the explicit terms of the present charter.[5]

But of how much practical importance, one may ask, is the pre-existing legislation dating back to the Consolidation Act of 1882 which, omitted from the Greater New York Charter, has been carried along by its saving clauses? What would have been the practical effect if it had been repealed outright? The adjudicated cases afford at the best a slender basis for a judgment.

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[1] *Matter of* Board of Public Improvements (1902), 77 App. Div., 351.

[2] Sec. 1608.

[3] See, for example: Worthington *v.* London Guaranty and Assurance Company (1900), 164 N. Y., 81, 85, "The student of the charter is constantly impressed with the fact that this is not a new enactment, but a continuation of the Consolidation Act of 1882 and its amendments as modified;" *Matter of* East 176th St. (1898), 33 App. Div., 365, 53 N. Y. Supp., 875, aff'd by memo. 158 N. Y., 668; People *ex rel.* Bierach *v.* York, *et al.* (1899), 36 App. Div., 185, 55 N. Y. Supp., 462; *in re* Opening of East 169th St. (1899), 40 App. Div., 452, 58 N. Y. Supp., 100, aff'd by memo. 161 N. Y., 622; People *v.* Jensen (1904), 99 App. Div., 355, 90 N. Y. Supp., 1062, aff'd by memo. 181 N. Y., 571.

[4] For an exposition of the rule on this point as it has been developed in the New York courts, see, for example, *Matter of* Estate of Prime (1893), 136 N. Y., 347, and cases there differentiated.

[5] Ghee *v.* Northern Union Gas Co. (1899), 158 N. Y., 510, the question at issue here being the location of the power to grant franchises for the use of the streets for gas-lighting purposes.

In People *ex rel.* Pumpyansky *v.* Keating, which has been shown to have involved the continuance of a law empowering the city over a particular matter, " it was not contended by either side that the city could grant any such right unless by virtue of such statute."[1] The effect of a contrary decision would presumably have been the enactment, or equally troublesome attempt to enact, a charter amendment. Most of the instances which raise the question of omitted legislation involve the details of procedure, and not powers. Although technical, they are not for this reason unimportant. In one of the cases already cited, *Matter of* Board of Public Improvements, to hold (said the Court) that the law in question had been repealed by omission from the charter would require a procedure in condemnation proceedings " which would increase the cost of these proceedings, now extremely burdensome to the city and the property owners."

The Present Charter in Relation to Laws Prior to 1882.

The charters of 1897 and 1901 left unrepealed all prior legislation (a) which was not " inconsistent " or (b) which was not " the same in terms or in substance and effect " or (c) which was merely " omitted." Such legislation was obviously to be found in the Consolidation Act of 1882, as amended to 1897, and in laws enacted between 1882 and 1897 which, although specially applicable to the City of New York, were not in the form of amendments to the Consolidation Act. But what of laws that antedated 1882? This raises the most difficult legal question that is presented in the whole subject of repeal. For whatever laws were left unrepealed by the Consolidation Act and are not inconsistent or identical in terms or in substance and effect with the provisions of the present charter are still in force.

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[1] People *ex rel.* Hofeller *v.* Buck (1920), 193 App. Div., 262, 266. It may be noted that when the Pumpyansky case was before the Appellate Division, the two judges who dissented from the opinion that the statute of 1896 had been repealed were inclined to rest their dissent upon the saving clause (sec. 41) of the charter which continued the pre-existing ordinances and upon the argument that the city still retained a general power over streets.

The problem that lies back of 1882 is not merely one of the application of a legislative intent; it concerns the intent itself. Did the omission of prior matter from the Consolidation Act accomplish its repeal by implication?

The question involves contingencies that are normally dormant and can at the worst be infrequent. Charter revision must, however, take account of potentialities. Old law has a way of bobbing up unexpectedly long after the event, and this is the more likely in those large fields in which the law of the city touches private property and, in connection with such matters as street improvements, assessments, taxation and the rest, not only creates relations between municipality and individuals but also leaves these to multiply in rights and obligations between private persons as transfers of real estate go on through the years. A single random illustration will suffice. In 1903 a case was decided that involved an action for ejectment on a tax sale for taxes of 1877-9, advertised and held in May, 1883, under a law of 1871 which governed such proceedings.[1] Any uncertainty in the intent of the Consolidation Act of 1882 to repeal or to continue prior law not only affects legislation from the beginning but also is carried into the present situation.

Inconclusiveness of Express Repealers in Connection with the Consolidation Act.

The first phase of the question is one of fact. What, exactly, did the Consolidation Act of 1882 and the legislation that led immediately to it say of repeal? The Consolidation Act itself contained neither specific nor general repealers nor, as far as New York City was concerned, did it contain any general saving clause. Section 2143, which dealt with the effect of the act, had to do primarily with the relation of the Consolidation Act to the Codes of Civil Procedure and of Criminal Procedure and the Penal Code. Its only phrases of general application provided:

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[1] Ely *v.* Azoy (1903) 39 Misc. 669.

(1) that the passage of the Consolidation Act should not affect penalties, forfeitures, rights of removal, etc., in actions already commenced, although under laws superseded or repealed by it; (2) that nothing in the act should "be construed as affecting any existing provision of law so far as such provision applies to any portion of the State other than the City of New York."[1] Otherwise, the Consolidation Act was silent regarding its effect on prior legislation.

The Consolidation Act must be considered, however, in connection with an earlier and separate enactment. On June 16, 1881,[2] at the instance of the commissioners who had already prepared the compilation of local laws and were then at work on the draft of the Consolidation Act, the legislature repealed by specific reference a considerable number of statutes which dated back to 1784 and which were deemed by the commissioners to be obsolete or otherwise inapplicable. But this, too, left the question of prior legislation open. In view of its express closing statement that the repeal of legislation by it should not be construed "as implying that any portion not herein mentioned remains in force," it could scarcely be argued—a doubtful contention at best—that the specific enumeration in this repealing act should be considered exhaustive.

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[1] This second provision was added by L. 1883, ch. 276, passed April 21, which altered 34 sections in the original Consolidation Act. The only other change made in sec. 2143, however, set forward the date when the Consolidation Act should be considered to be generally in effect from March 1 to April 1, 1883.

[2] L. 1881, ch. 537, "An Act to repeal certain acts and parts of acts therein named, so far as the same relate to or apply to or within the city of New York," effective July 1, 1882. Sec. 1 stated simply, "The following acts and parts of acts are hereby repealed, so far as the same relate to or in any manner apply to or within the city of New York * * *." Sec. 2, which followed the enumeration, read, "The repeal of any of the said laws shall not revive any provision of law repealed or superseded by any such law or portion thereof. The repeal by this act of the said acts or portions shall not be construed as implying that the same or any portion thereof has remained in force down to the passage of this act, or as implying that any portion not herein mentioned remains in force." Nothing more was said. This act was amended with reference to a slight error in a particular act which it had repealed, by L. 1882, ch. 301. It may be added that L. 1880, ch. 245, had repealed a number of acts by specific reference, in order to clear debris away from the Code of Civil Procedure; some of these naturally related to New York City.

Conflicting Evidences of Legislative Intent.

But, although silent in regard to its repealing effect, was there anything in the Consolidation Act or in the legislation leading to it which might be taken as an indication of the legislative intention concerning omitted legislation? The evidence is conflicting. (1) On the one hand there were indications of the purpose to make the Consolidation Act inclusive of all New York City law. The compilation of 1880, although legally quite separate from the Consolidation Act, served in fact and by common knowledge and with undoubted legislative intent as its basis. Of this compilation the legislature had declared that it was to be "considered as containing presumptively all special or local laws affecting the public interests in force in the City of New York, on the first day of January, 1880."[1] More directly in point was the language of the act of 1880[2] which directed the preparation of a consolidation: "In making such revision the said commissioners shall not make any change in the meaning of existing laws, but shall seek to simplify and to mold into consistent acts *all*[3] existing statutes upon matters embraced in such special and local laws." The term "all" was not found in the title of the Consolidation Act[4] but was employed at one point in the act itself; section 2143, in explaining why certain foregoing sections had been taken in substance from the Codes of Civil Procedure and of Criminal Procedure, although they were to have no effect upon the latter, stated that the designated sections were to "be treated and considered as embraced in this act solely in order that it may contain *all*[5] provisions of existing laws which are of special application in the City of New York." The possible implications of this wording are obviously lessened by its association, as an incidental explanation, with directions for the interpretation of a particular class of provisions in the Consolidation Act.

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[1] L. 1880, ch. 595, passed on the same day as the statute directing the commissioners to proceed with the task of actual revision.

[2] L. 1880, ch. 594.

[3] Italics are the author's.

[4] "An Act to consolidate into one act and to declare the special and local laws affecting public interests in the city of New York."

[5] Italics are the author's.

(2) On the other hand, the report of the commissioners who drafted the Consolidation Act expressly stated that they had omitted not only "laws which were temporary in their purpose" but also "laws which, though the basis of the existing order of things—the foundation of existing rights—seem not properly the subject for revision, as nothing affirmative remains to be done under them."[1] Yet such acts could not be considered obsolete. In the words of the report, "They, like many general laws of the State, are necessary to be referred to from time to time * * *." This important qualification is indeed recalled in the later language of the report: "It will certainly be no small gain if we can succeed in bringing into five hundred pages *all the active, effective*[2] laws specially applicable in the City of New York."

Cases Which Point to the Survival of Omitted Legislation.

Such being the facts, the second phase of the question is one of interpretation. Have judicial decisions since clarified the problem of legislative intent in the omission of prior matter from the Consolidation Act?

An early decision by an intermediate court at once presents itself in support of the position that acts of more than temporary nature were continued in force despite omission from the Consolidation Act. Mayor, etc., of the City of New York *v.* Buel[3] arose in the attempt of an employment agency to oppose the imposition of a penalty for failure to pay the license fee which a city ordinance prescribed. The basis of the ordinance was an act of 1822[4] that gave the common council "full power and authority to make and pass such by-laws and ordinances as they shall,

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[1] *Report of the Commissioners appointed under Chapter* 594 *of the Laws of* 1880, *with a Draft,* etc., May 23, 1881, p. iv. This passage in the report has already been quoted from, and the policy discussed, *supra,* p. 11.

[2] Italics are the author's.

[3] (1884) 12 Daly 494, in the Court of Common Pleas on appeal from judgment in the District Court of the 3d district.

[4] L. 1822, ch. 15. The ordinance in question dated to Apr. 30, 1827. It has been carried unchanged through the several revisions of the ordinances; it appeared, it may be added, in an edition of ordinances issued in 1894 (art. 20 of ch. VIII). This ordinance fixed the fee at $25 and $12 annually for renewal, with a penalty of $50 for each offense.

from time to time, deem necessary and proper for the regulation of intelligence offices," including, specifically, a charge for licenses at " such sum of money as the said common council may require." The Consolidation Act omitted this. In enumerating subjects in the jurisdiction of the common council, however, it conferred power to make ordinances " in relation to the licensing and business of * * * keepers of intelligence offices," among certain other designated trades.[1]

Had the omission of the act of 1822 repealed it and with it the ordinance, as the appellants contended? Conceivably, the court might have shifted the controversy from the line drawn by counsel and have held that the brief, vague, but broad mention of intelligence offices in the Consolidation Act covered the substance of the act of 1822 and was to be regarded as a mere continuation of it on this matter, thus saving the ordinance, despite repeal of the act of 1822. Instead, Justice Daly, with the concurrence of his colleague, held squarely that the early act remained in force. The short opinion will bear quotation almost in its entirety.

> " It does not follow, because, by the act of 1882, the local laws of the City of New York have been consolidated into one act, that a prior local law has been repealed. It must be repealed expressly, or by necessary implication.
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> Indeed, it has been said by Dwarris that the leaning of the court is so strongly against repealing the positive provision of a former statute by construction as almost to establish the rule of no repeal by implication (Dwarris on Statutes, 673, 674); and it is only where the provisions of the subsequent act are so contrary to or incompatible with the former that it will amount to a repeal of it; or where the whole construction of the subsequent act shows that it is intended to supersede it (Norris *v.* Crocker, 13 How. (U. S.) 429; Potter on Statutes, 155, 161, and cases there collected); which is not the case here.

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[1] L. 1882, ch. 410, sec. 86, subd. 20. Ordinances under this section were subject to a provision in sec. 85, which permitted "penalties for each and every violation thereof, in such sums as it may deem expedient, not exceeding one hundred dollars * * *." Sec. 283, empowering police officers to trace missing articles, also mentioned intelligence offices, but in another connection entirely.

> I do not find in the language quoted from the report of the commissioners who framed the Consolidation Act anything to warrant the assumption of the appellant that the commissioners intended to repeal the act of 1822. But even if they had expressed that such was their intention, it would not be enough; the repeal must be in the subsequent statute itself, either expressly or by necessary implication.
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> All that has been done in the Consolidation Act in respect to the keepers of intelligence offices is that they are classified amongst those in relation to whom ordinances requiring them to be licensed may be passed by the Common Council; and in this respect the Consolidation Act is merely cumulative of the pre-existing law in 1822, and does not in any way repeal the provision in the act of 1822 that the persons obtaining the license should pay therefor such sum of money as the Common Council may require. The Common Council therefore had authority to enact the ordinance that keepers of intelligence offices should pay for licenses the sums before named, and that if any one kept an intelligence office without having procured a license, he should be subject to a penalty of $50 for each offense."

The situation, clearly, was not the extreme one where the revision not only omits the earlier act but does not even mention its subject matter; such a case (as later paragraphs will show) would probably present less, rather than greater, difficulty in holding the prior legislation to be in force. Even in its field, Mayor, etc., of the City of New York *v.* Buel was inconclusive. It was never passed upon by a higher court; apparently[1] it has never even been cited in New York courts; no further decisions on the same point are found.

Other cases which have pointed in the same direction have given merely incidental or indirect indications. Thus the question in McKenna *v.* Edmundstone[2] was whether provisions of

[1] Shepard's, *N. Y. Misc. Cits.;* Silvernail's, *N. Y. Cits.,* 1794-1898.

[2] (1883) 91 N. Y., 231, aff'g. 10 Daly 410. See also *Matter of* Petition of Knaust (1886), 101 N. Y., 188, in which the court did not even mention the Consolidation Act in deciding that L. 1867, ch. 697, amended by L. 1868, ch. 288, did not repeal, by implication, L. 1866, ch. 367, regarding certain powers of commissioners of Central Park.

1875[1] which related specially to mechanics' liens in New York City had been repealed by the enactment, in 1880, of a statute[2] covering mechanics' liens in the cities of the State generally. The problem primarily concerned the effect of general on prior special legislation. In holding that the act of 1875 had not been repealed, the Court remarked incidentally, "The New York Consolidation Act incorporates (sec. 1807 & ff.) provisions found in both the act of 1875 and that of 1880, but we do not perceive that it affords any light upon the point here considered." This failure of the highest tribunal, at a time when the passage of the Consolidation Act of 1882 was freshly in mind, even to think of it as exhaustive of special New York City legislation was, at the least, significant.

Cases Which Point to the Repeal of Omitted Legislation.

Against these straws in the wind were certain cases which pointed to the opposite conclusion. *Matter of* N. Y. Institution for Deaf and Dumb[3] may be regarded as leading, not only in point of time[4] and the frequency of later citation, but also in the breadth of its dictum on the nature of the Consolidation Act. The litigation sprang from the fruitful field of street opening procedure. Had an act of 1865[5] providing for the opening of

[1] L. 1875, ch., 379.

[2] L. 1880, ch. 486.

[3] (1890) 121 N. Y., 234; 25 Abb. N. C., 31 (with note). *In the Matter* of Wheelock (1890) 121 N. Y., 664, was affirmed on the basis of this opinion. The lower court had already decided (1889), 21 N. Y. S. Rep., 369, that even if L. 1865, ch. 381, had conferred power over sewers on the commissioners of Central Park (which the court denied) the provision would be considered repealed by the vesting of jurisdiction over sewers in the commissioner of public works.

[4] Of the 7 cases adduced by counsel in *Matter of* N. Y. Institution for Deaf and Dumb in favor of the proposition that the Consolidation Act repealed the statute of 1865, only one, People *v.* Jaehne (1886), 103 N. Y., 195, dealt with the Consolidation Act, and that concerned the peculiar relation created by its sec. 2143 as regards the Codes of Civ. Pro. and Crim. Pro. Of 8 cases cited by opposing counsel in favor of the continuing force of the act of 1865, only one, McKenna *v.* Edmundstone (1883), 91 N. Y., 231, touched the Consolidation Act, and that, as has been pointed out, *supra*, p. 41, was significant because it at once dismissed it.

[5] L. 1865, ch. 565, sec. 8. Intervening legislation was also involved, but holding that L. 1874, ch. 604, had revived the provisions of 1865 after their partial eclipse under statutes of 1872 and 1873, the court set the question of consistency directly between the act of 1865 and the Consolidation Act of 1882.

certain streets been superseded by sections in the Consolidation Act which regulated such procedure generally? In answering this question, the Court said more than was required and more than, in strictness, it decided, since it was really an instance not of omission but of substitution. The fact that the Consolidation Act not only covered the subject matter of the act of 1865 but even embodied some of its provisions became a central point in the decision. The Court recognized this:

> "We have not, therefore, a case where some prior statute has been wholly omitted and no provision of any kind substituted in its place. But this is a case where the prior provision of law has been entirely dropped, and provisions under the same subject are found in the new act. Under such circumstances, how is the Consolidation Act to be construed? It was the manifest intention of the Legislature that it should take the place of the numerous special and local acts applicable to the City of New York, which had been enacted for more than a century, and to rescue them from the obscurity, uncertainty and difficulty caused by their scattered condition; and that intention should have effect" (p. 239).

The Court might have avoided altogether the question of the inclusiveness of the Consolidation Act, considered in its entirety, and have rested the decision upon the relation of the act of 1865 to the revised provisions on street opening procedure. This positive basis of decision was indeed suggested in the opinion although as a secondary consideration:

> "Against the construction contended for by the petitioner, the general rule may also be invoked, that where two statutes relate to the same subject-matter, although not in terms repugnant and inconsistent, if the latter one is plainly intended to prescribe the only rule that shall govern, it will repeal the earlier one."[1] (p. 240).

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[1] Citing on this point, *inter alia*, Heckmann *v.* Pinkney (1880), 31 N. Y., 211; People *v.* Gold and Stock Tel. Co. (1885), 98 N. Y., 79; People *v.* Jaehne (1886), 103 N. Y., 182, 193.

Actually, the decision went very little further, as its concluding passages will show:

> " Some of the authorities go so far as to hold that where prior statutes are revised or consolidated into one act, any part of the prior statute omitted must be deemed to have been repealed, although the matter omitted is in no way provided for in the new law. But we need not go so far in this case. Here sec. 8 of the act of 1865, contained provisions for the assessment and payment of the expenses of improving streets, and complete provisions upon the same subject, somewhat dissimilar, however, are contained in the Consolidation Act, and hence they must be deemed, under all the decisions, to take the place of the prior provisions, and to furnish the only rule upon the subject.
>
> We have, therefore, reached the conclusion that sec. 8 of the act of 1865, although not specially repealed, was superseded by the Consolidation Act * * *." (p. 241).

The relatively limited scope of the decision must guide the reading of its broad statements regarding the inclusiveness of the Consolidation Act. The Court considered the title of the act; particularly it marked the language of section 2143 which explained the reasons for including material from the Codes of Civil Procedure and Criminal Procedure.[1] "It is thus plain," the opinion said, " that it was the legislative intention that the Consolidation Act, made up of many acts taken from many books, should contain all the special and local acts applicable to the city of New York," and in a later paragraph, after examining certain cases[2] in other jurisdictions, it said, " These views

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[1] *Supra*, p. 38.

[2] Only one of these, however, involved the question of the exhaustiveness of a codification of the whole body of statute law within one jurisdiction, as distinguished from the revision by a particular act of a prior act or acts on the same subject. Bowen *v.* U. S., 14 U. S. Ct. of Claims, 162, involved the intent of the Revised Statutes of the U. S. " The object was to relieve one from the necessity of having recourse to the earlier statutes, except in cases of grave doubt, or of absolute conflict between different sections of the revision." The other cases cited, Ellis *v.* Paige (1822), 1 Pick., 43, and Bartlett *v.* King (1815), 12 Mass., 537, involved only effects in the revision of one act by another

are quite applicable to the Consolidation Act, which was intended to revise and consolidate the whole statute law relating to the city of New York."

Subsequent cases have not removed the uncertainty from this dictum. Of the opinions which have since cited *Matter of* New York Institution for Deaf and Dumb in some connection or another,[1] five only have dealt directly with the Consolidation Act. They, too, have always involved the substitution of material in the Consolidation Act, not its outright omission.

Matter of Board of Street Opening[2] stressed the broad intention back of the Consolidation Act, as evidenced in its history, to make it comprehensive of New York City law. The point immediately at issue concerned a peculiar saving clause attached to that part of the Consolidation Act which regulated the opening of streets, etc.: "Nothing contained in this title shall be construed as affecting any provision of special acts relating to particular districts or portions of the city, so far as such provisions are inconsistent with the provisions of this title."[3] A statute of 1865[4] had provided that in the area north of 155th Street property owners should not be assessed for more than half of the construction cost of any street over a mile long. Later legislation, in 1874,[5] had restated this limitation as applicable in the 23d and 24th wards. Did the saving clause just quoted operate to continue the provision in the scope given to it in 1865? The decision turned upon the determination that it had already been repealed, since the commissioners who drafted the Consolidation Act indicated in the notes to their

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[1] Shepard's *N. Y. Ct. of App. Cits.*, and the author's observations, locate 27 such cases (not including *Matter of* Wheelock), of which 5 dealt with the effect of the Consolidation Act of 1882; 12 with the effect of codification of some kind, although none with the codification of the body of law relating to a city; 2 with the bearing of the Rochester charter on prior legislation; 8 with the effect of omission in a case of revision of one act by another, of which 3 cited *Matter of* N. Y. Inst. for D. and D. only to distinguish it.

[2] (1895) 86 Hun., 267.

[3] Sec. 1008, applying to Title 5, "Opening Streets, Avenues, and Public Places," found in Ch. XVI, "Taxes and Assessments," L. 1882, ch. 410.

[4] L. 1865, ch. 565, sec. 4.

[5] L. 1874, ch. 604.

final report that the law of 1865 was to be regarded as superseded by acts of 1871 and 1874.[1]

Poth *v.* Mayor, etc., of N. Y.[2] assumed without argument that two special acts had been "repealed or superseded by the Consolidation Act, which provided for all cases of assessments." Mercantile National Bank *v.* Mayor, etc., of N. Y.,[3] held that the Consolidation Act stated all the conditions under which assessments could be reviewed by certiorari and that resort could not be made to the more generous terms which had been stated in an act on the subject in 1880.

Ely *v.* Azoy[4] turned upon the question whether, where the Consolidation Act embodied the substance of previous law in practically identical language, it should be regarded merely as a continuation of the earlier provisions, thus saving from disturbance actions and other proceedings in progress at the time of its enactment. In holding that it should be so regarded, the Court mingled with its decision dictum on the broader problem of repeal:

> "The Consolidation Act, however, although a new act, was intended to be a compilation and codification of a great number of acts relating to the City of New York, and undoubtedly operated to repeal absolutely all inconsistent provisions of the former laws, and all provisions of former laws omitted in the consolidated statute. But as to provisions re-enacted in the Consolidation Act in the

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[1] The note read: "1865, ch. 565, Comp. 998, superseded by 1871, ch. 534, and 1874, ch. 604." *Report of the Commissioners appointed, etc., with a Draft,* etc. (1881), p. 403. But reference to this made it necessary to distinguish *Matter of* N. Y. Institution for the Deaf and Dumb, which had held that sec. 8 of L. 1865, ch. 565, was still in force when the Consolidation Act was adopted. The ground of distinction was that the particular subject-matter of sec. 8, unlike that of sec. 4, was not covered in L. 1871, ch. 534, nor L. 1874, ch. 604. It can be seen how flexible was the guide thus made of the annotations of the commissioners.

[2] (1896) 151 N. Y., 16, 20. The special acts were L. 1880, ch. 537, and L. 1881, ch. 648, amending L. 1871, ch. 598. The annotations in the report of the commissioners, in 1881, do not extend later than the session of 1879.

[3] (1902) 172 N. Y., 35, 44. The earlier statute involved was L. 1880, ch. 269. The decision was rendered easier because sec. 821 of the Consolidation Act, as amended by L. 1885, ch. 311, contained the words, "but only on the grounds * * *." The court did not have to say how it would have construed the original wording of the section.

[4] (1903) 80 N. Y. Supp., 620, 39 Misc., 669.

> same words which were used in the former act, or in different but equivalent words, the law must be regarded as continuous, and the new act as to such parts will not operate as a repeal of the former acts so as to defeat a public remedy or to put an end to proceedings properly begun."

Danielsen *v.* Sigsbee, Humphrey & Co., *et al.*,[1] very recently, faced the question of the effectiveness today of an early statute that defined the jurisdiction of a local court over seamen. "At this point," said the opinion, "it is essential to ascertain the effect of the Consolidation Act of 1882, ch. 410 In view of the title of the act, was there a repeal by implication of ch. 71 of the Laws of 1819? Do the provisions of sec. 2143 change the ordinary rule in reference to repeal by implication?" The Court, noting that the same question had been raised in *Matter of* N. Y. Institution for the Deaf and Dumb, pointed out regarding that case:

> "the provisions of the omitted section were covered by other legislation in the new enactment, which did not follow the omitted provisions. * * * In the case at bar, the provisions of the old act (ch. 71 of the L. of 1819) were incorporated in the new act in almost the identical language, and, in addition, the effect of such provisions was extended, so as to cover, not only actions for seamen's wages, but also any action for services brought against an owner or master of a vessel, providing such services were rendered during any voyage of such vessel. Thus the new act is somewhat broader than the old."

As for sec. 2143, the very fact that the particular subdivision of the Consolidation Act was specifically excepted in the enumeration of certain parts which were not to effect the Codes of Civil Procedure and of Criminal Procedure, created the implication that a repeal was to take place. "It is a fair inference that they thus intended that the old act should be superseded, and that they contemplated that the consolidation should repeal or super-

[1] (1921) 187 N. Y. Supp., 700, 702. Although not in point here, it may be added that sec. 1286, held herein to repeal L. 1819, ch. 71, was itself repealed by the Municipal Court Act, L. 1902, ch. 580.

sede some prior enactments is obvious from the language used in sec. 2143."

Judicial interpretation in the cases which have directly involved this phase of the Consolidation Act, then, has not settled the doubts regarding its effect in repealing by omission. On the one hand, pointing against repeal, stands a single case, never carried to the highest court and apparently never cited favorably or unfavorably, which denied the exhaustiveness of the Consolidation Act even in the grant of power to city authorities on general matters. Partly supporting it, stand several others which, in their failure to consider the Consolidation Act as a factor in deciding the continuing force of pieces of legislation prior to 1882, may be construed to have held by implication that the Consolidation Act was not exhaustive. On the other hand, pointing toward repeal, a half-dozen cases have refused to give effect to prior legislation that, although neither expressly repealed nor positively repugnant, was omitted from the Consolidation Act. Several of these spoke broadly of a legislative intention to make the revision of 1882 a complete declaration of New York City law; actually, they decided no more than that, at the points where the Consolidation Act touched the subject matter of prior legislation, selected from it, and provided a reasonably complete scheme, the Consolidation Act repealed what it omitted.

The Doctrine of Codification Consulted.

Such being the facts and the interpretations immediately in point, can light upon the repealing effect of the Consolidation Act be had from the theory of codification generally?

There is substantial agreement that, if an intent to codify is apparent and if the revision covers the subject-matter of an omitted piece of legislation, the omission repeals it by implication, even though the express terms of old and new law are consistent.[1]

[1] For example: Sutherland, *Statutes and Statutory Construction* (2d ed., by J. Lewis, 1904), Vol. I, p. 520, says, "A revising statute embracing antecedent general laws on various subjects and reducing them to one system and one text repeals all prior statutes upon the same subjects not included in the body of the revision and not exempted by an express

Although the more incisive decisions in point seem to have arisen in other jurisdictions, numerous New York cases[1] have applied this doctrine to the revision of laws in particular broad fields, as civil procedure, liquor, banking and the like, even to the point of counteracting the usual rule that general legislation does not repeal prior special acts.[2] The obverse of the doctrine

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clause. Where one act is formed from another, some parts taken and others omitted; or where there are two acts on the same subject, and a later embraces all the provisions of the first and also new provisions, the later act operates, without any repealing clause, as a repeal of the first. But the object of the old and the new acts must be the same. The fact of revision raises a presumption of a complete code, or a complete treatment of the subjects embraced in it." The anonymous commentator in 25 *R. C. L.*, 924-5 remarks, "As a general rule, the enactment of revisions, codes and compilations, and of statutes manifestly designed to embrace an entire subject of legislation, operates to repeal former acts dealing with the same subject, although there is no repealing clause to that effect. The application of the rule is not dependent upon the inconsistency or repugnancy of the new legislation and the old; for the old legislation will be impliedly repealed by the new even though there is no repugnancy between them * * *." Endlich, *A Commentary on the Interpretation of Statutes* (1888), p. 272, does not so rigorously qualify his generalization, "But the general rule seems to be that statutes and parts of statutes omitted from a revision are to be considered as annulled, and are not to be revived by construction," citing in this connection, however, cases which in most instances do not involve revision in the broader sense of the term codification.

[1] Illustrations are: (1) mechanics liens in N. Y. C., Heckmann *v.* Pinkney (1880), 81 N. Y., 211 (L. 1875, ch. 379, held to repeal L. 1863, ch. 500); (2) horse-racing, People *v.* Cleary (1895), 13 Misc., 546; (3) Code of Civil Procedure, People *v.* Levy (1896), 16 Misc., 615; Brigham *v.* N. Y. (1919), 185 App. Div., 917, aff'd 227 N. Y., 575; (4) tax law, People *ex rel.* Newburg Sav. Bank *v.* Peck (1898), 157 N. Y., 51; *Matter of* Huntington (1901), 168 N. Y., 399; Pratt Institute *v.* City of New York (1905), 183 N. Y., 151; Peterson *v.* Martino (1914), 210 N. Y. 412; (5) Code of Criminal Procedure, People *ex rel.* Sloane v. Fallon (1899), 27 Misc., 16; (6) Statutory Construction Law, Ryer *v.* Prudential Ins. Co. of America (1905), 95 N. Y. Supp., 1158; (7) Municipal Court Code, Kral *v.* Lovitz (1916), 161 N. Y. Supp., 127. In the field of more general codification, an early case, Harrington *v.* Trustees of Rochester (1833), 10 Wend., 547, 551, held that the Revised Statutes of 1830 repealed a prior repugnant act despite the presence of a specific repealer in which this act was not mentioned; the court argued that implication alone was enough to accomplish repeal in connection with consolidations. No New York case seems to have held, however, that the omission of an act which was neither repugnant to nor on a subject covered in a codification automatically repealed such act.

[2] *Infra.*, p. 60, for comment on this problem in regard to New York City.

is that omission does not repeal if the subject-matter of the earlier act is not covered.[1]

The difficulty in applying this doctrine to such a revision as the Consolidation Act of 1882, however, is already apparent; it would remain even if more numerous and more emphatic precedents existed in New York for the principles just stated. There is an important practical difference between a statute that gathers together and reduces to one text the previous enactments on such a subject as "corporations" or "banking" and, on the other hand, the consolidation of all kinds of laws affecting a particular locality. It has been shown that the crucial factor in determining whether prior legislation is repealed by omission is the relation of the subject-matter of the prior act and of the code.[2] But what shall we regard as

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[1] Sutherland, *op. cit.*, at p. 523: "An act to revise and consolidate the various acts on a general subject will not repeal a particular act relating to some branch of that subject which is omitted from the revision and whose subject-matter is not covered by it. Thus, an act to revise the criminal law and containing no provisions on the subject of pools, trusts, and conspiracies in restraint of trade was held not to repeal a particular act on that subject. (Commonwealth *v.* Grinstead, 108 Ky., 59, 57 S. W., 471.) So a general revision of the revenue laws was held not to repeal the inheritance tax law, nor a law imposing a privilege tax on railroads; the new law being silent on those subjects (Zickler *v.* Union Bank and T. Co., 104 Tenn., 277). A revision of the law in regard to local improvements was held not to repeal a provision of the former law prescribing a special limitation in regard to suits to set aside or enjoin a special assessment (Kansas City *v.* Kimball, 60 Kan. 224, 56 Pac., 78)." In 25 R. C. L., at p. 925, it is said, "It has, however, been held that the omission of a statute from a revision does not effect its repeal, although all statutes within its purview which are not contained within it are expressly repealed by it, if no provision in the revision attempts to deal with the subject matter of the omitted statute," citing Hammer *v.* State, 173 Ind., 199, 21 Ann. Cas., 1034, 24 L. R. A. (n. s.), 795. Black *Handbook on the Construction and Interpretation of the Laws* (2d ed., 1911), at p. 593, notes of the Revised Statutes of the U. S. (1873), "Where it is found that an act of Congress which is an independent statute, permanent in character, although special in its application, and not repealed by any act prior to the revision of the statutes, has been omitted from the Revised Statutes, it nevertheless continues in force," citing Peters *v.* U. S., 2 Okla., 116, 33 Pac., 1031

[2] Other variable and important factors in determining the effects of codification (which need not be discussed here since the repealing clauses of the Consolidation Act of 1882 and of the charters have been examined) but which may hopelessly differentiate seeming analagous cases, are: (1) Do legislative history and other antecedent events indicate an intention to revise completely; (2) Does the revision expressly declare itself to be a codification and in what language? (3) Does it expressly declare that non-repugnant acts shall continue? (4) Does it expressly repeal certain acts and, if so, is such repealer expressly qualified to protect against the implication that the acts which it does not mention are continued?

the subject of the Consolidation Act? Or what shall we consider to be the subject of an act, dealing, say, with a phase of street openings, which the Consolidation Act omitted? Shall we say "New York City," or, rather, "assessments"? If the former, it can be argued from the usual rules for the construction of codes that the Consolidation Act automatically repealed all prior laws touching New York City.

The problem just stated has not been adjudicated squarely. The question of the subject of the Consolidation Act was raised obliquely in another connection,[1] because of alleged conflict with the constitutional provision that "no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title."[2] If the point were strained, it would embarrass every city charter. One escape is to follow an earlier case which held that the New York City charter of 1857 was neither private nor local.[3] A more sensible solution, and one which the later cases already cited have tended to apply, assumes that a charter is both special and

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[1] People *ex rel.* 2d Ave. R. Co. *v.* Coleman (1889), 51 Hun., 640, 4 N. Y. Supp., 417, in which L. 1885, ch. 311 was attacked as unconstitutional because its title stated simply that it was an act to amend L. 1882, ch. 410. The court held that if any fault existed, it was in the Consolidation Act, yet to demand that the title of that act should fully describe its contents would be to defeat the very purpose of the constitution. *In re* McAdam (1889), 7 N. Y. Supp., 454, aff'd 54 Hun., 637, upheld against a similar charge of unconstitutionality, L. 1884, ch. 516, the title of which stated that it amended L. 1882, ch. 410, "in relation to commissioners of accounts." The court found that this title was more explicit than that of the Consolidation Act; the title of the latter, the opinion implied, was suitable for its purpose, saying that the Consolidation Act "was virtually a charter of the city of New York." In People *v.* Kane (1900), 43 App. Div., 472, 473, 61 N. Y. Supp., 632 (aff'd. on opinion below, 161 N. Y., 380), it was said of the Greater N. Y. Charter: "It is of no moment that the provisions of law violated or evaded are contained in different sections of the charter. The charter is one statute * * * and the eye of the law so regards it. The division thereof into chapters and sections is but formal."

[2] Art. 3, sec. 16, in both the Constitutions of 1846 and 1894.

[3] Phillips *v.* Mayor, etc., of N. Y. (1857), 1 Hilt., 483, 488, in which Justice Ingraham of the Court of Common Pleas said in part: "I am not prepared to admit that the act in question is either a private or a local bill. It can in no sense be called a private bill * * * Nor do I think such an act, devolving upon others the powers which the legislature possesses for the purposes of government, can be called a local act." Citing Connor *v.* Mayor, 1 Selden 285, he continued: "With much greater force may these remarks be applied to a statute providing for the government of a large

local but that, from the standpoint of constitutional restrictions on enactment and entitling statutes, a charter must for practical reasons be regarded as embracing only one subject. Could this construction be borrowed in the application of the theory of codification to the question of implied repeal in connection with Consolidation Act? It has never been suggested. Instead, the cases which have discussed the relation of the Consolidation Act to prior acts have always thought of the subject of both acts in terms of phases of city activity, not the whole of it.

The theory of codification, then, leads surely to no automatic conclusion; it throws us back, as the repeal of any piece of prior legislation comes into dispute, upon a judgment in the comparison of the subject-matter of the old and the new.

The Legislative Heritage of Communities Absorbed in Greater New York.

In addition to the uncertainty in the location of old law affecting the former City of New York which the Consolidation Act of 1882 left to the present day, it is necessary, if the sources of city government are to be encompassed, to note another element of uncertainty which was created by the amalgamation of three existing cities and of a number of minor municipalities. The Greater New York Commission based the charter of 1897 largely upon "legislation already upon the statute books in relation to one or the other of the cities to be consolidated into Greater New York."[1] The law of old New York was not exclusively used. "Where the local laws have differed," the Commission reported, "in matters financial and relating to

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portion of the territory and property of the state, delegating powers of legislation and authorizing the passage of laws as well as the administration of them, which in their operation affect all citizens of the state, who either in their persons come within their range or whose property is within the limits of that jurisdiction * * * Nor do I think that the provisions of the statute can be said to be of more than one subject. The act was intended to provide or add to the charter of the city."

[1] Report made by the Commission which prepared the Greater New York Charter to the Legislature, Feb. 18, 1897 (as printed in Birdseye, *The Greater New York Charter, p.* xxxii).

property, the law of New York has generally been given the preference; in matters indifferent, the best law, in the opinion of the commission, obtaining in any of the three cities has been maintained * * *." In any case, and regardless of the former municipality from which it was taken, such borrowed legislation was declared "to be not a new enactment, but a continuation."[1]

But the process did not consist merely in the express copying of provisions applicable to the various communities. The Greater City took over, along with the areas which it combined, an uncatalogued dowry of law. The opening sections of the charters of 1897 and 1901 declared the Greater City "to be the successor corporation in law and in fact of all the municipal and public corporations united and consolidated * * * with all their lawful rights and powers, and subject to all their lawful obligations, without diminution or enlargement except as herein otherwise specially provided."[2] Lest there be possible doubt, the closing sections of the charters of 1897 and 1901 incorporated broad saving clauses regarding the formerly separate municipalities, saying: "their powers to the full extent of legislative power in this behalf are respectively devolved upon the corporation of The City of New York as herein constituted and the municipal assembly thereof, unless otherwise expressly provided in this act or by law,"[3] and that "any grants of franchises or properties or rights of any nature * * * granted by said state to the City of Brooklyn or to any of the other municipal and public corporations which are herein united and consolidated * * * are to all intents and purposes hereby ratified, granted, confirmed and extended to The City of New York as constituted by this act."[4]

But the legislative heritage of the several communities was not saved to the Greater City by these broad clauses alone. There

[1] Sec. 1608, L. 1897, ch. 378, repeated as sec. 1608 in L. 1901, ch. 466.
[2] Sec. 1, L. 1897, ch. 378, repeated in L. 1901, ch. 466. See also sec. 3, in both acts, for a reiteration of the idea in slightly different terms. Secs. 4-5 relate especially to the devolution of debts.
[3] Sec. 1615. Here, as in the citations following on this point, the section numbering and text are the same in both L. 1897, ch. 378, and L. 1901, ch. 466.
[4] Sec. 1617.

was also a devolution of power upon particular agencies in the new government. The Board of Aldermen, aside from the fact that it was declared to possess any unassigned powers directly granted to or devolved upon the corporation,[1] was expressly vested with all powers and duties conferred at the time of consolidation "upon the common council of the City of Brooklyn or of Long Island City, or upon any board, body or officer of any of the municipal and public corporations or parts thereof, consolidated with The City of New York."[2] The Board was further vested, by another section, with "Any and all of the powers and duties of the several boards of supervisors heretofore existing in any of the counties within the territory of City of New York not transferred or devolved upon administrative departments, boards, commissions, officers or other functionaries * * *"[3]

More important, perhaps—inasmuch as the powers possessed by a city are normally assigned by law to some particular part of its organization—were the clauses, scattered through the several chapters of the charter, which devolved upon each important administrative department all unenumerated and consistent powers and duties of its predecessors in all parts of the area of the Greater City.[4] Space does not permit an examination of the provisions by which this device was applied to the Commissioners of the Sinking Fund,[5] the Police Department,[6] the Borough presidents in respect to highways[7] and sewers,[8] the Department of Water Supply, Gas and Electricity,[9] the Street Cleaning De-

[1] Secs. 1 (in part) and 4.

[2] Sec. 42. The ordinances of the superseded municipal councils were continued, in so far as consistent, by sec. 41.

[3] Sec. 1586.

[4] It is not in point here to consider (1) numerous sections devolving jurisdiction (*e. g.*, 695) or property *e. g.*, 275, 608, 724, 817), nor (2) those continuing the powers of former N. Y. C. agencies, even when extended to the Greater City (*e. g.*, 243, 945), nor (3) the devolution upon a city department of all powers of a particular agency, as the Trustees of Brooklyn Bridge (601), nor (4) partial examples, as the devolution of powers of the building department of the city of Brooklyn on the superintendent of buildings in that borough (sec. 646, renumbered 408 in 1901 charter).

[5] Sec. 204; see also, on particular phases of the sinking fund system, secs. 207, 208, 209, 211, 221.

[6] Sec. 274.

[7] Sec. 388.

[8] Sec. 389.

[9] Sec. 517.

partment and the Borough presidents of Queens and Richmond Boroughs in regard to street cleaning,[1] the Park Board,[2] the Department of Taxes and Assessments,[3] the Department of Education,[4] and the Department of Health.[5] A single illustration must suffice to show how broadly these provisions were couched. The Board of Taxes and Assessments was declared to possess, in addition to its stated powers and in so far as compatible with the express terms of the charter, "All of the rights, powers and duties heretofore devolved by law upon the board of taxes and assessments in The City of New York, upon the department of assessments of the City of Brooklyn, and upon like departments, boards or officers of taxes and assessments other than for street improvements in the other municipal and public corporations or parts of municipal and public corporations consolidated by this act * * *."[6]

As active sources of power, these grants have always been more theoretical than real and, naturally, have been of diminishing importance. Attempts to appeal to them have been made,[7] however, and the possibility remains. As long as it does remain, the boundaries of the statutory sources of New York City's present government are pushed out and back into the legislative histories of several municipalities, especially Brooklyn. There the

[1] Sec. 547.
[2] Sec. 616.
[3] Sec. 886.
[4] Sec. 1058. This was not repealed by L. 1917, ch. 786, amending the General Education Law (Con. Laws, ch. 16), which superseded some 30 sections of the charter.
[5] Sec. 1168.
[6] Sec. 886.
[7] Queens Co. Water Co. *v.* Monroe (1903), 83 App. Div., 105, 82 N. Y. Supp., 610; Heymann *v.* Steich (1908), 114 N. Y. Supp., 603, aff'd, 118 *ibid.* 1113, aff'd 201 N. Y., 578. Neither of these cases sustained the particular contention regarding devolved power which was advanced in each but, in rejecting these particular claims, neither denied that powers of the consolidated municipalities devolved on the Greater City and that this fact might be made the basis of present-day action. Most of the cases which have concerned the organization or powers of Brooklyn or the other municipalities have arisen out of the temporary difficulties of transition from separate municipalities to the Greater City; for example: (1) settlement of claims, Carey *v.* Wurster (1898), 31 App. Div., 553, 52 N. Y. Supp., 160; *In re* Vacheron (1900), 51 App. Div., 182, 64 N. Y. Supp., 503; (2) transfer of personnel, McKenna *v.* City of N. Y. (1898), 34 App. Div., 152, 54 N. Y. Supp., 634; (3) transfer of functions, People *ex rel.* Quinn *v.* Feitner (1898), 30 App. Div., 241, 51 N. Y. Supp., 1094, aff'd 156 N. Y., 694.

boundaries are left, as far as Brooklyn is concerned, with less uncertainty of frontier than has been noted in connection with the New York City Consolidation Act of 1882. The legislation affecting Brooklyn had scattered as the New York City law had done. It had been drawn together and revised in 1888.[1] Fortunately this dealt with the question of repeal more conclusively than did the New York City Consolidation Act of 1882. It expressly stated that "all local and special acts passed prior to Jan. 1, 1888, relating to the corporation of the City of Brooklyn * * * are hereby repealed."[2]

The Royal Grants as Continuing Sources of City Government.

The royal grants survive as part of the city's law. The several constitutions of New York expressly preserved them,[3] although not against amendment subsequently by acts of the legislature.[4] The Greater City Charter was even more explicit than the

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[1] L. 1888, ch. 583, "An Act to revise and combine in a single act all existing special and local laws affecting public interests in the city of Brooklyn." The commissioners who prepared this revision were appointed under L. 1886, ch. 626. See Report of Law Department of Brooklyn, 1884, p. 57, in volume entitled, *Mayor's Message*, 1884.

[2] A leading case, People *ex rel.* Ullrich *v.* Bell (1889), 4 N. Y. Supp., 869, held that where the substance was repeated, the revision was to be regarded as a continuation of prior existing law and the re-enactment of a regulation based upon an earlier and superseded act was unnecessary.

[3] Const. 1777, art. 36: "* * * that nothing in this constitution contained shall be construed * * * to annul any charters to bodies-politic by him or them * * * made" (referring to King or his agents); repeated in Const. 1821, art. 7, sec. 14; in Const. 1846, art. I, sec. 18; in Const. 1894, art. I, sec. 17. The effect upon the statute of October 14, 1732 (ch. 584), in confirmation of the previous royal grants, of the provision of December 10, 1828 (*2 Rev. Stat.*, 779, sec. 4), that "no statute passed by the government of the late colony of New York shall be considered a law of the State," would present no present problem even if the Greater City Charter did not expressly mention the act of 1732.

[4] Demarest *v.* the Mayor, etc., of City of N. Y. (1878), 74 N. Y., 161, which involved an action against the abolition of the board of assistant aldermen by the charter of 1873, the court saying: "The Dongan and Montgomerie charters have no peculiar sanctity because they were granted under the sovereigns of England. They were public charters granted for public purposes and are as much subject to legislative control as charters of the same kind granted by the legislature of the state." As for the constitutional proviso, it said: "This provision is not a restraint upon legislative power, but simply a declaration that the constitution itself shall not annul such charters." Against this viewpoint, which is the merest commonplace today, see, as an example of an earlier attitude, Kent, *The Charter of the City of New York with Notes Thereon* (1836), "Corporate franchises in this country rest upon a basis which ought to be at least as solid as *Magna Charta*, for they are founded on grants that

previous legislative charters[1] in conserving "* * * grants of franchises or properties or rights of any nature in, to or concerning property of any character or other grants made by the Nicolls' charter, the Dongan charter, the Cornbury charter (so-called), the Montgomerie charter, by the confirmatory act passed the fourteenth day of October, Seventeen hundred and thirty-two" * * *, which it declared "are to all intents and purposes hereby ratified, granted, confirmed and extended to The City of New York as constituted by this act."[2]

The growing detail of legislative enactment early began to elaborate upon, and by that very process was soundly held to restrict,[3] the broad terms of the royal grants.

Even in later years, however, appeals to them as sources of power were made from time to time. In 1878, for example, the Court said: "The corporation of the City of New York has plen-

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are contracts, and 'no state,' says the constitution of the United States, 'can pass any law impairing the obligation of Contracts'" (1851 ed., p. 203). For a further indication of early uncertainty on the point, see Furman *v.* Knapp (1821), 19 Johnson, 248, in which the court remarked, "It is not necessary, therefore, to discuss or consider here how far the legislature, without the consent of the corporation, might modify or change the charter."

[1] L. 1830, ch. 122, sec. 26, L. 1849, ch. 187, sec. 28, and L. 1853, ch. 217, sec. 18, spoke merely of "the charter of the city of New York and the several acts of the Legislature amending the same," which they declared repealed so far as inconsistent, but otherwise continued. L. 1857, ch. 446, sec. 54, and L. 1870, ch. 137, sec. 120, provided: "* * * but the charter(s) of the city of New York, known as the Dongan and Montgomerie charters, so far as the same or either of them are now in force, shall continue and remain in full force, and shall not be construed as repealed, modified, or in any manner affected hereby." L. 1873, ch. 335, sec. 119, was not so loose: "The charters of the city of New York, known as Dongan and Montgomerie charters, so far as the same or either of them are now in force, not inconsistent with the provisions of this act, shall continue and remain in full force." The Consolidation Act of 1882 reprinted nothing of this, although giving a part of sec. 119 which had to do with another matter; this might be taken as an argument against the idea of repeal by omission, since all commentators assumed the royal grants continued in force.

[2] Sec. 1617, in both L. 1897, ch. 378, and L. 1901, ch. 466.

[3] Mayor, etc., of N. Y. *v.* Ordrenan (1815), 12 Johnson 122, representing the question whether an ordinance which imposed cumulative fines for keeping gunpowder except under certain conditions was valid. The court held that it was not, saying: "If it be conceded, that the by-laws in question were authorized by the general powers conferred by the charters, upon which we express no opinion, the application by the corporation to the legislature, and the latter having, in several instances, legislated on

ary power over the making, repairing, improving and paving of the streets of the city. That power was conferred by the Dongan charter and confirmed by the Montgomerie charter, and still exists unimpaired."[1] Less conclusively, it was said in 1895: "The broad powers for purposes of municipal government possessed by the common council of the City of New York, derived from its ancient charters and modified and enlarged by subsequent statutes, include, to the fullest extent consistent with constitutional limitation, the power to control and regulate the public streets."[2]

But when, in 1916, the city sought, among other bases of power, to find in the original royal grants a sanction for its attempt to compel the relocation of tracks on Central Park West, the Court waved the contention aside, saying: "The assertion and the argument of the appellant that the power in question was bestowed by the ancient charters of the city and has devolved to it need not detain us. Neither their language or intent nor the contemporaneous conditions support the assertion."[3] The terms of the Greater City Charter, already quoted, might properly be held to confine the continuing authority of the royal charters to the peculiarly proprietary activities of the city, which, although at one time sharply controversial[4] and still important, may be regarded as fairly well adjudicated.

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the subject matter of the by-law, operates as a limitation to any general and undefined powers in the charters" (p. 125). When Brick Presbyterian Church *v.* Mayor, etc., of N. Y. (1826), 5 Cowen, 538, presented the question of the validity of an ordinance which prevented burials upon a plot which had been granted earlier by the city for purposes of "quiet enjoyment," the city authorities did not attempt, in the face of the Ordrenan case and the fact that the legislature had acted in regard to the city's control of such matters, to appeal to the powers of the original charters. So, also, in Coates *v.* Mayor, etc., of N. Y. (1827), 7 Cowen, 585.

[1] Moore *v.* The Mayor, etc., of New York (1878), 73 N. Y., 238.

[2] Jorgensen *v.* Squires (1895), 144 N. Y., 280.

[3] People *ex rel.* City of N. Y. *v.* N. Y. R. Co. (1916), 217 N. Y., 310, 312. The unfavorable decision was followed by a charter amendment, L. 1917, ch. 692, adding sec. 242c.

[4] As an example of how nicely the lines of the controversy over New York City rights (here, jurisdiction to low water on the Long Island shore), were once drawn, *cp.* Udall *v.* Trustees of Brooklyn (1821), 19 Johnson, 175, which held that a weigher licensed by New York City could not operate on a fixed dock, with Stryker *v.* Mayor (1821), 19 Johnson, 179, holding he could operate on a floating vessel on the Brooklyn shore. See also Hoffman, *Treatise upon the Estate and Rights of the Corporation of the City of New York as Proprietors* (1853); Gerard, *A Treatise on the Title of the Corporation to the Streets, Wharves, Piers, Parks, Ferries, and other Lands and Franchises in the City of New York* (1872).

CHAPTER III.

THE SOURCES TODAY—GENERAL LAWS.

The Problem of Parallel General and Special Legislation an Unavoidable Complication—The Usual Rule of Adjustment—Its Application in New York State—Its Application to the General City Law, the General Municipal Law, and the Civil Service Law—A Decade's Legislation Examined—The Use of Classification of Cities in the Consolidated Laws—Legislation Affecting Judicial Organization, Precedure, and Penalties—Legislation for Counties—The Problem of a Better Adjustment of Special and General Law—The Common Law as a Source—Summary.

The quest for the sources of the law affecting New York City, if it is exhaustive, must carry one beyond legislation which, whether recent or very old and whether assembled or scattered, applies peculiarly to the municipalities now combined in the Greater City. The existence of some general legislation that ramifies into municipal affairs seems inevitable under any system. Even if it were deemed desirable to drop the attempt to simplify state-city relations and to lessen the vexing dependence upon special legislation by general provisions in behalf of certain common local activities or certain classes of cities, the necessity would remain for general enactments on penal offenses, judicial procedure, and other matters which are woven in the fabric of municipal government. Problems of conflicting law follow inevitably.

The Usual Rule of Adjustment.

Yet the rule of adjustment[1] is simple; it is cumbered in its application only by the necessity of judgments on questions of intention and differences of degree. A general act will not supersede a prior special act unless the general act clearly reveals an intention to create a uniform rule. Conversely, a special act will

[1] See Sutherland, *Statutes and Statutory Construction* (2d ed., by J. Lewis, 1904), vol. I, secs. 274-8, pp. 526-38. Black, *Handbook on the Construction and Interpretation of Laws* (2d ed., 1911), p. 329.

graft an exception upon pre-existing general law. The theory is that the Legislature recognizes certain exceptional conditions when it passes a special act and that it considers these still to exist when, later, it legislates generally on the same subject. The problem, then, is always one of intention. "The search for it," said the Court in a recent case in point,[1] "leads below the surface of verbal expression, and, piercing all disguises, goes straight to the purpose of the law-makers, aided by formulated rules when they serve, bound by no rule that obstructs the discovery of the rational genuine purpose of the Legislature."

Its Application in New York State.

These principles have received a normal application in New York. It was said in a leading case in 1872;[2] "A special and local statute, providing for a particular case or class of cases, is not partially repealed or amended, as to some of its provisions, by a statute general in its terms, provisions and application, unless the intention of the Legislature to repeal or alter the particular law is manifest, although the terms of the general act would, taken strictly, and but for the special law, include the case or cases provided for by it." Other and later decisions along the same line have abundantly illustrated that general laws do not over-

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[1] *In re* Seeley (1921), 187 N. Y. Supp., 130, 133, aff'd in 196 App. Div., 920, and 231 N. Y., 601, holding that the County Law superseded a special provision of 1822 for courts in Seneca County. But note in another recent case, the disposition to require that repeal must be express: "The law is well settled that special statutes which are local in their application are not deemed repealed by general legislation, except upon the clearest manifestation of an intent by the Legislature to effect such repeal, and such repeal cannot ordinarily be accomplished by implication." People *v.* City of Buffalo (1916), 157 N. Y. Supp., 938, holding that a charter provision for the payment of fines to the city treasurer was not superseded by the Motor Vehicle Law.

[2] *In re* Commissioners of Central Park (1872), 50 N. Y., 493, 497, holding that a section of the *R. L.* of 1813, in relation to New York City, which made reports by commissioners of estimate and assessment conclusive and final was not superseded by a code provision in L. 1867, ch. 697, governing the proceedings of courts; they related, the court said, to two different systems.

ride prior special enactments,[1] and the corollary that special laws do triumph, up to the length of the inconsistency, over pre-existing general statutes.[2] Cases have not been wanting, however, to show how the weight of legislative intention, especially when the element of codification is present, may tip the scales in favor

[1] *Matter of* The Evergreens (1872), 47 N. Y., 216 (act for settlement of claims against a particular cemetery company, not superseded by act for sale of unoccupied burial grounds and rural cemeteries generally); People *v.* Quigg (1874), 59 N. Y., 83 (special act governing the collection of fines in N. Y. C. not superseded by a more general act regarding the police force); Van Denburgh *v.* Village of Greenbush (1876), 66 N. Y., 1 (mechanics lien law for a particular locality not superseded by a general act on the subject); Whipple *v.* Christian (1878), 15 Hun., 321, aff'd 80 N. Y., 523 (essentially similar to preceding); McKenna *v.* Edmundstone (1883), 91 N. Y., 231 (essentially similar to preceding); *Matter of* Altering Main Street, Sing Sing (1885), 98 N. Y., 454 (charter provision not superseded by general highway law); People *ex rel.* Roosevelt *v.* Westchester County Supervisors (1886), 40 Hun., 353 (special grant to town of power to appropriate for highway purposes not repealed by general act, despite express statement that it applied to "every town"); Higgins *v.* Bell (1889), 6 N. Y. Supp., 105, aff'd (1891), 128 N. Y., 598 (Brooklyn charter provision for police inspection of boilers not superseded by general act exempting boilers guaranteed by insurance companies); Buffalo Cemetery Association *v.* Buffalo (1889), 118 N. Y., 61 (charter provision regarding assessments of cemetery lands not repealed by law forbidding sale of such lands for taxes); Aldinger *v.* Pugh (1890), 57 Hun., 181 (special provision regarding surrogate in Oneida County not superseded by Code of Civil Procedure); People *ex rel.* Lardner *v.* Carson (1894), 30 N. Y. Supp., 817, aff'd (1895), 86 Hun., 617 (provision of Lockport charter permitting town elections within city not repealed by General Election Law); People *ex rel.* Trustees *v.* Dohling (1896), 6 App. Div., 86 (provision of special act creating a corporation not superseded by statute governing the exemption from taxation of the property of religious corporations generally); Lewis *v.* City of Syracuse (1897), 13 App. Div., 587 (charter provision not superseded by act regulating time limit of damage suits in cities over 50,000); Casterton *v.* Town of Vienna (1897), 44 N. Y. Supp., 868, aff'd (1900), 163 N. Y., 368 (special act not superseded by statute governing generally the assessment of lands divided by town lines); People *ex rel.*, Speight *v.* Coler (1898), 31 App. Div., 523 (civil service; law of 1896 regarding exemption of confidential positions did not repeal Brooklyn charter provision); City of Jamestown *v.* Home Telephone Co. (1908), 125 App. Div., 1 (charter power to prevent setting of poles, etc., not superseded by Transportation Corporations Law); People *ex rel.* Conklin *v.* Boyle (1917), 163 N. Y. Supp., 72, aff'd 178 App. Div., 908 (Public Officers Law not applied as against the more special provisions of the County Law, the court saying, "The conflict between such statutes must be resolved in favor of the legislation which is specific"); Ryan *v.* City of N. Y. (1920), 228 N. Y., 16, rev'g 189 App. Div., 49 (charter provision for police pension fund not superseded by Workmen's Compensation Law).

[2] Schieffelin *v.* McClellan (1909), 135 App. Div., 665, app'l dissm'd (1910), 197 N. Y., 610, held that city was bound only by sec. 74 of charter, and not also by sec. 92 of prior general Railroad Law, the court saying:

of the superiority of general law.[1] They have tipped more easily when the local provision has been an ordinance merely, since direct evidence has then been lacking that the Legislature has taken cognizance of a special situation.[2]

Its Application to the General City Law, the General Municipal Law, and the Civil Service Law.

Nor has the application of these principles differed essentially in the case of bodies of law which, as the General City Law[3] and

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"It is a well established rule of statutory construction that a later special statute which covers the whole subject matter of an earlier general statute, and which, although not repugnant to the earlier statute, embraces new and more specific provisions, will be held to have been intended, within the scope of its operations, as a substitute for and a repeal *pro tanto* of the earlier general act" (p. 669). But compare People *ex rel.* Kemmett *v.* Craig (1908), 60 Misc., 300, aff'd 128 App. Div., 908 (Rochester charter, L. 1907, ch. 755, held not to have superseded Liquor Tax Law of 1896, court saying legislature could not have intended to "make a farce" of the earlier act by giving police court exclusive jurisdiction).

[1] *In re* City of Buffalo (1892), 18 N. Y. Supp., 771 (special act for acquisition of park property in particular ward in West Seneca held to be repealed by the Condemnation Law of 1890); *Matter of* Dobson (1895), 146 N. Y., 357 (Brooklyn charter provision superseded by an act vesting the power to fix salaries of firemen of cities of 90,000 population or over, the court saying: "To hold otherwise, it would be necessary to disregard the language and general scope of the act, as well as the facts notoriously existing when the act was introduced and passed."); City of Buffalo *v.* Neal (1895), 86 Hun., 76 (charter provision for payment of fines by keeper of penitentiary superseded by County Law); Barker *v.* Town of Floyd (1901), 69 N. Y. Supp., 1109 (special act authorizing the erection of a town hall superseded by Town Law); *Matter of* Troy Press Co. (1907), 187 N. Y., 279 (special acts regarding the designation of newspapers by a particular board of supervisors superseded by Second Class City Law and General Tax Act, the court saying: "They exhaust the subject to which they relate and irresistibly lead to the inference that they should become a substitute in place of the local, previously existing statutes"); Murdoch *v.* Griffenhagen (1917), 165 N. Y. Supp., 361 (special act regarding sheriff's fees superseded by Code of Civil Procedure); Municipal Gas Co. *v.* Public Service Commission (1920), 186 N. Y. Supp., 541 (Special act fixing standard gas in Albany superseded by an act for 2nd class cities); *In re* Seeley (see comment in text and note, *supra*, p. 60).

[2] *Matter of* Reddish (1899), 45 App. Div., 37; 1914 *Opinions of Atty. Gen.*, vol. 2, pp. 366-70.

[3] L. 1909, ch. 26, constituting ch. 21 of *Cons. Laws*. Its basis was in L. 1900, ch. 327, which had consolidated some general laws regarding city affairs.

the General Municipal Law,[1] deal peculiarly with local governments. Potentially, they bind everywhere.

"The provisions of the City Law," it was said in an early case,[2] "can hardly be considered as directory merely. They are mandatory. The wisdom of these provisions cannot be questioned by any city which may be disinclined to comply with them." Actually, their force fluctuates with the presence of charter or other special provisions. In this early case it was held that the provision of the General City Law for the appointment of examining boards of plumbers was effective over a part of the earlier Geneva charter which vested jurisdiction over plumbing in the Department of Health; the Court seemed to be influenced by the fact that the general law stipulated that examining boards of plumbers should cooperate with the health authorities. On the other hand, People *v.* Parmerter[3] had already held that the terms of the General Municipal Law did not override special provisions of city and village charters regarding the issuing, signing and registering of municipal bonds.

The line of demarcation is suggested in three cases which have involved the right of a taxpayer to inspect the books and papers of New York City departments. *Matter of* Egan[4] held that the right, in the situation there in point, must be found in sec. 51 of the General Municipal Law. Its dictum, in admitting that "special statutes relative to public documents in particular departments" might prevail, however, made it easy to distinguish *Matter of* Allen,[5] in which access to the documents of the Department of Health was held to be governed by a detailed section of the charter (1175) in relation to that department. So, too, *In re*

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[1] L. 1909, ch. 29, constituting ch. 24 of *Cons. Laws.* It revised L. 1892, ch. 685, which had brought together a number of statutes dating back to L. 1840, ch. 318. The municipal corporations to which its terms apply unless otherwise specified comprise counties, towns, villages and cities.

[2] People *ex rel.* Van Dieren *v.* Moore (1902), 78 App. Div., 28, 30. See also remarks in *In re* Clamp (1900), 68 N. Y. Supp., 345.

[3] (1899) 158 N. Y., 385. It may be added that, without the point being assumed to be controversial, taxpayers' suits have been held to be governed by sec. 51 of the Gen. Mun. L. and sec. 1925 of the Code of Civil Procedure. Altschul *v.* Ludwig (1916), 216 N. Y., 459, followed in Schieffelin *v.* Craig (1918), 183 App. Div., 515.

[4] (1912) 205 N. Y., 147.

[5] (1912) 205 N. Y., 158.

Ihrig[1] held that sec. 1545 of the charter was controlling because this section expressly exempted from inspection documents in the hands of the Law Department, to which the papers in question had passed from the Department of Water Supply, Gas and Electricity.

Nor does the application of the principles regarding the relation of general and special laws differ essentially in connection with those general acts which, like the Civil Service Law, relate to some underlying feature of the organization or methods shared by all units of government. Judicial construction of the Civil Service Law in relation to the charter of 1897 is instructive. The constitution, it will be recalled, already stated that the merit system should exist in every political subdivision and that "Laws shall be made to provide for the enforcement of this section."[2] A law of 1898,[3] amending the existing Civil Service Act, required that regulations framed locally should receive the approval of the state commission. At the time, the Greater New York Charter provided that the regulations should be made by the city civil service commission with the approval of the mayor.[4] In People *ex rel.* Leet *v.* Keller[5] the Court declined to apply the new requirement of the state law to New York City, saying: "I think that the charter provisions contained a special and exclusive system for the classification and examination of applicants * * *. They manifested a deliberate intention on the part of the Legislature to take the City of New York out of the General Civil Service Law of the State." The realization of state supervision for New York City did not come until the charter, as amended in 1901, provided expressly that the local commission should promulgate its regulations and otherwise act in the manner defined by the Civil Service Law and "subject to and in pursuance of the provisions of that law and of such amendments as may

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[1] (1917) 167 N. Y. Supp., 1051.
[2] Art. V, sec. 9, added in 1894.
[3] L. 1898, ch. 186.
[4] L. 1897, ch. 378, sec. 123. The only form of state supervision the charter recognized was the submission of such reports as the state body might direct. *Ibid.*, sec. 125.
[5] (1898) 157 N. Y., 90, 96.

from time to time be made to it * * *."[1] The altered situation which has existed since 1901, being the result of these express and unique charter provisions, may render obsolete but does not reverse the earlier cases, nor does it indicate that general laws such as the Civil Service Law, by the force inherent in their own nature, affect special local legislation differently from other general acts.

[1] L. 1901, ch. 466, sec. 123; also, to the same effect, 124. For one of the leading cases construing these altered provisions, see People *ex rel.* Fleming *v.* Dalton (1899), 158 N. Y., 175. In connection with the proposal made in the charter draft of 1911 to strike out reference to the state law, the Bar Association committee argued against any tendency to develop a separate civil service law for each municipality. *Hearings before the Joint Committee on Cities of the Senate and Assembly,* 1911, vol. 2, pp. 678-9. At the same hearing (pp. 1126-1166) Mr. Goodwin on behalf of the Civil Service Reform Association of New York attacked the same feature of the proposed charter, declaring that state supervision was the most vital safeguard and that the proposal was tantamount to the amendment of the general Civil Service Law by a special city charter. (p. 1129.) Mr. Ordway of the same organization reported later, "It would have been a terrible blow to the cause in New York City if the charter had been adopted in that form, so we fought it as a whole." *Proceedings of the Civil Service Reform League, Dec.* 1911, p. 21. Yet the attack was not prompted by any unusual suspicion of the then mayor of New York City. In the previous year, the report of the N. Y. Civil Service Reform Association stated, "In New York City we have found Mayor Gaynor an effective supporter of the merit system. At the beginning of his administration, he announced that it was his policy in respect to appointments in the police and fire departments to appoint men in the exact order in which they appeared upon the list. * * * Later he announced that this was his policy with regard to all appointments." *Ibid.,* Dec. 1910. But no doubt many who fought the proposed change in the system of state supervision in 1911 entertained some doubts when, in 1914-1915, the State Civil Service Commission began an investigation of the city commission which Mayor Mitchel combatted as "grotesque and a scandalous perversion of power." Ordered on September 18, 1914, it led through charges and counter-charges and some 7,705 pages of testimony to the *Report on Investigation of the Municipal Civil Service Commission and the Administration of the Civil Service Law and Rules in the City of New York,* tendered Feb. 1, 1915 (Sen. Doc. 35), which stated, "we regret to have to say that the Municipal Civil Service Commission has shown itself in many respects to be weak and inefficient." (p. 141.) A reconstituted state commission, however, virtually repudiated these charges in a report rendered May 20, 1915. Mr. Nelson S. Spencer said of the whole affair, "The investigation undoubtedly served a useful purpose, although its origin was apparently malicious and its conduct unjudicial * * *. It developed, however, matters which needed correction not only in the administration under the rules but in the rules themselves, and the municipal commission has shown a lively disposition to profit by its results." "New York City's Civil Service," in *National Municipal Review,* Jan. 1916, vol. V, p. 55.

NUMBER OF GENERAL LAWS AFFECTING THE GOVERNMENT OF CITIES IN NEW YORK STATE, 1910-1919, INCLUSIVE.

Chapter in Consolidated Laws (1909) Amended	Total	Applying to First-Class Cities Only	Applying to Cities at Large		
			Application Unqualified	Some Cities Excluded Expressly*	Application Varied Expressly with Size of City, etc.**
Agricultural Law (ch. 1)	1	..	1	..	..
Banking Law (ch. 2; *rev'd*, L. 1914, ch. 369)	2	..	2	..	..
City Local Option Law (ch. 68; L. 1917, ch. 624)	2	..	..	..	2*a*
Civil Service Law (ch. 7)	4	..	4	..	..
Conservation Law (ch. 65; *rev'd*. L. 1911, ch. 647)	3	..	3	..	..
County Law (ch. 11)	2	..	2	..	..
Domestic Relations Law (ch. 14)	3	..	1	..	2*b*
Education Law (ch. 16; *rev'd*, L. 1910, ch. 140)	18	..	6	4[1]	8*c*
Election Law (ch. 17)	12	..	..	5[2]	7*d*
Executive Law (ch. 18)	1	..	1	..	..
Farms and Markets Law (ch. 69; L. 1917, ch. 802)	2	..	..	1[3]	1*e*
General Business Law (ch. 20)	5	1	2	2[4]	..
General City Law (ch. 21)	13	3	7	2[5]	1*f*
General Municipal Law (ch. 23)	13	..	9	3[6]	1*g*
Highway Law (ch. 25)	6	..	4	..	2*h*
Insanity Law (ch. 27)	1	..	1	..	..
Insurance Law (ch. 28)	5	..	3	2[7]	..
Labor Law (ch. 31)	4	..	1	..	3*i*
Legislative Law (ch. 32)	2	..	2	..	..
Liquor Tax Law (ch. 34)	5	..	1	..	4*j*
Membership Corporations Law (ch. 35)	1	..	1	..	..
Military Law (ch. 36)	2	..	1	..	1*k*
Navigation Law (ch. 37)	1	..	..	1[8]	..
Penal Law (ch. 40)	6	..	5	1[9]	..
Poor Law (ch. 42)	5	..	5	..	..
Prison Law (ch. 43)	1	..	1	..	..
Public Health Law (ch. 45)	5	2	1	1[10]	1*l*
Public Lands Law (ch. 46)	1	..	..	1[11]	..
Public Officers Law (ch. 47)	3	1	2	..	..
Public Service Commissions Law (ch. 48; L. 1910, ch. 480)	2	..	1	..	1*m*
Railroad Law (ch. 49; L. 1910, ch. 481)	4	..	3	1[12]	..
Real Property Law (ch. 50)	3	..	1	2[13]	..
Tax Law (ch. 60)	17	1	12	..	4*n*
Tenement House Law (ch. 61)	17	16	..	1[14]	..
Town Law (ch. 62)	3	..	3	..	..
Transportation Corporations Law (ch. 63)	2	..	1	1[15]	..
Workmen's Compensation Law (ch. 67; L. 1913, ch. 816)	1	..	..	1[16]	..
Total Number which have affected chapters in Consolidated Laws	178	24	87	29[17]	38
Acts applying to cities which have not in terms amended Consolidated Laws	14	4	6	3	1*o*
Grand Total	192	28	93	32	39

* Some cities expressly excluded:

[1] (*Education*) L. 1913, ch. 424 (state control of historical records; not to contravene duties already imposed on officers in New York and Kings Counties); L. 1914, ch. 44 (retirement scheme not to apply where one exists); L. 1918, ch. 496 (retirement of employees

other than teachers only in places over 100,000); L. 1919, ch. 181 (local historians only in places under 1,000,000). [2] (*Election*) L. 1911, ch. 542 (voting machine districts, New York City and Buffalo excluded); L. 1914, ch. 5, L. 1918, chs. 50, 392 (elections in cities having elections at other than time of general election); L. 1918, ch. 181 (provision for special elections, New York City excluded). [3] (*Farms and Markets*) L. 1917, ch. 813 (state aid for markets in places over 10,000). [4] (*General Business*) L. 1910, ch. 187 (city scaler of weights and measures, New York City excluded, but later put under act, as amended by L. 1917, ch. 523); L. 1911, ch. 825 (coal and coke sale regulated, but not in New York City). [5] (*General City*) L. 1911, ch. 825 (repealing provisions in regard to the sale of coal and coke); L. 1918, ch. 546 (borrowing to meet excise tax deficiencies, except in 2nd class cities, this restriction being removed, L. 1918, ch. 115). [6] (*General Municipal*) L. 1910, ch. 558 (provision of hospitals, New York City excluded from most of terms); L. 1918, ch. 637 (convention expenses of officials, cities of 1st class excluded); L. 1919, ch. 372 (county and city wholly within it may unite on memorial). [7] (*Insurance*) L. 1911, ch. 322 (fire patrols, insurance premiums, etc., in cities over 1,000,000); L. 1912, ch. 523 (boiler inspection; not to operate in cities already having such regulation under law or ordinance). [8] (*Navigation*) L. 1911, ch. 620 (harbors on Hudson above New York City). [9] (*Penal*) L. 1910, ch. 327 (persons not admitted to bar practicing in courts, in cities of 1st and 2nd classes). [10] (*Public Health*) L. 1913, ch. 559 (amending health law generally, but New York City expressly exempted from many of its terms, and definition of health board organization not extended to cities of 1st and 2nd classes). [11] (*Public Lands*) L. 1916, ch. 299 (sale of canal land, buildings, etc., confined to cities, etc., within which located). [12] (*Railroad*) L. 1914, ch. 492 (tunnel railroads in cities of 1,000,000 or over). [13] (*Real Property*) L. 1910, ch. 227 (recording of conveyances, required only cities over 500,000); L. 1914, ch. 309 (somewhat similar procedure required in cities over 200,000). [14] (*Tenement House*) L. 1911, ch. 388 (requiring the lights in hall; applies to 1st and 2nd classes; unique in that rest of Tenement House Act applies to cities of 1st class only). [15] (*Transportation Corporations*) L. 1913, ch. 495 (stage and bus lines, cities over 750,000). [16] (*Workmen's Compensation*) L. 1919, ch. 458 (limited by terms to places within counties having board of supervisors, which may provide by taxation for retirement system for city, village and other employees. [17] (No Chapter of Con. Laws amended) L. 1911, ch. 746 (canal terminals); L. 1913, ch. 149 (cities purchase canal lands); L. 1919, ch. 470 (celebrations etc., for veterans by cities containing one or more counties or by counties).

**Application varied expressly with size, etc., of cities:

a (*City Local Option*) L. 1917, ch. 624, amended by L. 1918, ch. 178 (local referendum system provided generally, but special procedure stipulated for New York City). *b* (*Domestic Relations*) L. 1912, ch. 241 (marriage, licenses, with different provisions stated for 1st class cities); L. 1916, ch. 524 (marriage solemnization, with different officials empowered in cities over 1,000,000, 100,000 to 1,000,000, and others). *d* (*Education*) L. 1913, ch. 748 (vocational schools, continuation of pupils in school being required only 1st and 2nd class cities); L. 1916, ch. 182 (medical inspection required everywhere, with possibility of extra officers in places over 5,000); L. 1917, ch. 786, L. 1918, ch. 252, L. 1919, ch. 409 (organization of local boards of education, with variations provided partly on basis of former organization partly on basis of cities over 1,000,000, 400,000 to 1,000,000, and others); L. 1918, ch. 409 (night schools required, lengths of term varying as between 1st, 2nd, and 3rd class cities); L. 1919, ch. 645 (salaries, prohibition against sex discrimination applying to cities over 1,000,000 and amounts for each grade differing between cities over 1,000,000 and other cities and districts). *d* (*Election*) L. 1910, chs. 428 (different provisions for cities over 1,000,000), 432; L. 1911, chs. 649, 891, L. 1914, ch. 244; L. 1916, ch. 537 (different provisions for first class cities); L. 1918, ch. 8; all of foregoing expressly modifying certain of their provisions for New York City. *e* (*Farms and Markets*) L. 1917, ch. 803 (local markets may be established, the fees differing in 1st, 2nd and 3rd class cities). *f* (*General City*) L. 1916, ch. 305 (regulations of plumbers, powers elsewhere vested in department of health vested in examining board of plumbers in New York City). *g* (*General Municipal*) L. 1913, ch. 699 (city planning commissions, appointment differing in cities over 1,000,000, and number of members varying in 1st, 2nd and 3rd class cities). *h* (*Highway*) L. 1913, ch. 319 (construction of highways through cities, many provisions differing for cities of 1st and 2nd classes); L. 1916, ch. 72 (regulation of motor cycles, with saving clause for traffic regulations of cities of 1st class, and of 2nd class in county adjoining city of 1st class). *i* (*Labor*) L. 1913, ch. 463 (regulation of bakeries, etc.; rules of state department do not apply in cities of 1st class); L. 1913, ch. 618 (sale of newspapers by minors, with slightly different procedure in enforcement for New York City stated). *j* (*Liquor Tax*) L. 1910, ch. 494 (hours of sale stated varied for cities of 1st, 2nd and 3rd classes); L. 1911, ch. 298 (some provisions regarding hotels applicable only to cities of 1st class); L. 1916, ch. 416, L. 1917, ch. 624 (regulation of many phases of traffic in liquor, with differing provisions as regards license fee, etc., for places in 7 population groups). *k* (*Military Law*) L. 1916, ch. 355 (localities can ask for military aid, but New York City board of estimate, not mayor merely, makes request for it). *l* (*Public Health*) L. 1915, ch. 133 (vaccination as a qualification for admission to schools required at all times only in cities of 1st and 2nd classes, in addition to powers conferred on all cities and school districts when smallpox exists). *m* (*Public Service Commissions*) L. 1913, ch. 505 (steam power regulation, but in cities of 1st and 2nd classes having existing agency, such agency will act under state law and commission's rules). *n* (*Tax*) L. 1911, chs. 471, 804; L. 1916, ch. 323; L. 1917, ch. 488 (regulating procedure in special franchise and other forms of taxation, making express provision of different machinery of New York City). *o* (No chapter of Consolidated Laws amended) L. 1913, ch. 313) make up, etc. of Tercentenary commission).

A Decade's Legislation Examined.

A body of general legislation, then, surrounds the special New York City law, sometimes over-riding the latter but oftener effective only where special provisions are inconclusive or are lacking altogether. Of what does this general legislation consist? Its nature is indicated in an accompanying tabulation of acts which, during the first decade after the consolidation of the New York Statutes in 1909, affected cities of the first class or cities at large. Such a tabulation can be only approximate. It is not easy to say just what legislation affects cities. Many enactments[1] refer in terms to cities or to particular classes of cities simply in order to limit geographically the application of some state law and thus to adjust it to varying economic conditions; many,[2] including numerous provisions in the Labor Law, prescribe conditions which are at least potentially of interest to local officers but which, because they directly impose no local function, cannot be regarded as affecting cities in a real sense. No two persons would draw the same line in excluding these from the tabulation. The present table must be taken on this modest basis.

It will be observed that of the 192 general acts affecting cities during the decade, 178 amended in terms slightly over half of the various chapters which make up the consolidated laws. Even the casual glance will find some meaning in the manner in

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[1] *E. g.*, the Insurance Law, Cons. L., ch. 28, sec. 143, as amended by L. 1915, ch. 56, set fees for a broker's certificate, issued by the state superintendent of insurance, at different sums for brokers operating in 1st, in 2d., in 3d class cities and in other places; or, to take a more extreme example, L. 1919, ch. 37, amended the Banking Law to permit banks to maintain branches in cities over 50,000, whereas previously the limit had been 1,000,000.

† *E. g.*, L. 1918, ch. 434, restricting work by male minors and women as messengers at night in cities of first and 2d class; L. 1917, ch. 535, regulating women's hours in restaurants in such cities. Or L. 1910, ch. 348, and L. 1911, ch. 393 (amending the General Business Law but repealed by the Banking Law as revised L. 1914, ch. 369), which required the licensing of private bankers engaged in ticket-selling, etc., in cities of 1,000,000 or over. But *cp.* those just cited, which have been omitted from the table, with L. 1913, ch. 463, which, in amending the labor law regarding conditions in bakeries, stated that their execution in 1st class cities should vest in the local departments of health; the latter has been included in the table.

which the legislation has scattered and in the relative frequency with which the several chapters have been amended in regard to cities: the Education Law, by 18 acts; the Tax Law, 17; the Tenement House Law, 17; the General City Law, 13; the General Municipal Law, 13; the Election Law, 12; the Highway Law and the Penal Law, each 6; the General Business Law, the Insurance Law, the Poor Law, the Public Health Law, each 5; the Civil Service Law, the Labor Law, the Railroad Law, each 4. There is no first class cities' law, as such; and it will be observed that legislation on behalf of first class cities exclusively has been relatively slight, the table showing twenty-eight such statutes. Of the total of 192 acts covered, only fourteen were left hanging in the air without a formal relation to an existing body of laws. More than half of the latter were temporary in effect.[1]

The General City Law and the General Municipal Law have been important but by no means primary centers of this legislation. The pull of the specialized chapters of the consolidated laws has been stronger than the fact of a common municipal relation. Aside from this, moreover, the General City Law and the General Municipal Law were built of legislative leavings in the beginning and remain too fragmentary to offer lodgment conveniently to new legislation within a wide scope. The General City Law, for example, gives one of its fourteen active articles to the broad powers which were conferred on cities by the so-called Home Rule or Municipal Empowering Act of 1913;[2] other separate articles are concerned with such relatively narrow fields as the regulation of plumbing, of plastering, of lodging houses, of coal distribution, the employment of police matrons. The contents of the General Municipal Law are nearly as miscellaneous and unequal.

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[1] One of these, L. 1913, ch. 788, illustrates that the ponderous arm of general legislation may be lifted to correct very particular situations. The act provided that if "in any city" of the 1st class "any person" had made a deposit for the restoration of a side-walk, on which there existed a surplus, he might, by a stated procedure, apply for it within one year after the passage of the act.

[2] L. 1913, ch. 247, *infra*, pp. 84-97.

The Use of Classification of Cities in the Consolidated Laws.

The constitutional classification of cities,[1] obviously, has not been the sole measure used in this legislation. At least fifteen of the acts that are considered in the tabulation based their operation wholly or in part upon other population groupings.[2] The various chapters of the consolidated laws abound in such provisions.

The constitutional problem need not be sharpened, since decisions long ago blunted it into practical shape. The basis of a loose construction was expressed as early as 1877 in an opinion that held the old rapid transit act of 1875 to be general.[3] By 1898 a reluctant court admitted that it was "too late to insist upon a strict construction * * * we must take up that work, at the present time, with a liberal view of the law and of the situa-

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[1] N. Y. Const. of 1894, Art. XII, sec. 2 (as amended November 5, 1907, lowering limit of 1st class cities from 250,000): "All cities are classified according to the latest state enumeration, as from time to time made, as follows: The first class includes all cities having a population of one hundred and seventy-five thousand, or more; the second class, all cities having a population of fifty thousand and less than one hundred and seventy-five thousand; the third class, all other cities. Laws relating to the property, affairs or government of cities, and the several departments thereof, are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class * * *." On the basis of the 1915 state enumeration, New York City, Rochester and Buffalo still comprise the 1st class; Albany, Binghamton, Schenectady, Syracuse, Troy, Utica and Yonkers, the second; the third class cities number 37. In the 1920 federal census, Niagara Falls is just above the 50,000 line; Syracuse, just below 175,000.

[2] One act, L. 1916, ch. 416, drew its lines at 1,500,000, 500,000, 50,000, 10,000, 5,000, 1,200, and under; five acts, L. 1911, ch. 322, L. 1913, ch. 699, L. 1914, ch. 492, L. 1919, chs. 181, 645, drew the line at 1,000,000; one, L. 1916, ch. 524, staked the boundaries at 1,000,000, 100,000—1,000,000, and below; another, L. 1919, ch. 409, at 1,000,000, 400,000—1,000,000, and below; one act, L. 1913, ch. 495, at 750,000; one, L. 1910, ch. 227, at 500,000; one, L. 1914, ch. 227, at 200,000; one, L. 1918, ch. 496, at 100,000; one, L. 1917, ch. 813, at 10,000; one, L. 1916, ch. 182, at 5,000; one, L. 1911, ch. 298 discriminated incorporated places over 1,200.

[3] *Matter of* N. Y. Elevated R. R. Co. (1877), 70 N. Y., 327; followed in *Matter of* the Application of Church (1883), 92 N. Y., 1 (holding general an act which applied to any county containing an incorporated city of over 100,000 inhabitants in which territory contiguous to the city had been mapped out in streets); also followed in People *ex rel.* N. Y. Electric Lines Co. *v.* Squire (1888), 107 N. Y., 593 (subway act of 1885, as amended L. 1886, ch. 503, held neither private nor local).

tion."[1] Later, the Rapid Transit Act,[2] which applied to cities of 1,000,000 or over, was assailed on the ground, among others, that it was in fact special and as such had been imperfectly enacted. In sustaining it,[3] the language of the Court on this point showed that its conception of special legislation held more than a trace of the old idea that some legislation holds a proprietary advantage for cities and that primary distinctions can be erected on this basis. The Court remarked:

> "It is said that because the Rapid Transit Act does not relate to all cities of the first class, it is a special city law which can be passed only as by the Constitution provided. Again I disagree with the contention of the appellants. In the first place, Rapid Transit Act was passed before this constitutional provision went into effect. In the second place, the act is not one of those contemplated by the provision in question. The latter contemplates laws which relate to municipal property and affairs and which may be described, as the provision does describe them, as 'city' laws. * * * It (the act) was adopted not only for the benefit of the cities which, of course, would be affected, but of the public at large, and it confers broad powers, including that of the granting of franchises. It is a much more general law than is contemplated by the provision in question."

Nor has the constitutional provision embarrassed the frequent legislation that varies its terms within peculiar population limits.

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[1] *Matter of* Henneberger (1898), 155 N. Y., 420, 429. The court, however, drew the line here and held unconstitutional, under Art. 3, sec. 18, and Art. 8, sec. 10, a law of 1897 (ch. 286) which provided for the laying out of highways in *towns* of 8,000 or more, containing villages of 8,000 to 15,000 population. The constitutional classification of cities was not involved.

[2] L. 1891, ch. 4; repeatedly amended (by at least 18 acts, for example, between 1910 and 1918, incl.) and still one of the most important sources outside the charter of what is for practical purposes New York City legislation.

[3] Admiral Realty Co. *v.* City of N. Y. (1912), 206 N. Y., 110, 140. See also Gubner *v.* McClellan (1909), 115 N. Y. Supp. 755, which had held that the Public Service Commission's Act (L. 1907, ch. 429) was neither local nor private.

Thus an amendment to the election law, which in prescribing the methods of registration required an extra column with the personal signatures of voters and other formalities in cities over 1,000,000, was declared to be general in its terms.[1]

Legislation Affecting Judicial Organization, Procedure and Penalties.

The table which has been presented fails to show the considerable body of legislation which affects the administration of justice and which, standing partly inside and partly outside the charter, is in many instances general. Its subject-matter is in the main three-fold: the organization of courts, some within New York City being peculiar to that city, others universal in the State; judicial procedure, civil and criminal; penal provisions. No consistent policy regarding the inclusion of these matters in the New York City charter has been followed. The tendency to shift from the general laws of the state to the charter at least those portions that concerned peculiarly local tribunals has been sometimes in evidence. Thus the Commissioners of Statutory Revision, reporting in 1900 on their plans for the Code of Civil Procedure, said:[2] "The special provisions relating to the City Court of New York will be included in the New York Consolidation Act. Many of these sections are already in that statute as well as in the Code, and it is believed that for the sake of convenience they should be in one statute only, and that it is not necessary to continue them in the Code." Even when, in 1902, a special commission[3] brought together many scattered laws in the Municipal Court Act,[4] nearly a score of related sections in the Greater City charter were deliberately left untouched.

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[1] *In re* Ahern (1909), 130 App. Div., 900, 115 N. Y. Supp., 1108, aff'd in Ahern *v.* Elder, 195 N. Y., 493.

[2] *Report of the Commissioners of Statutory Revision,* April 5, 1900, vol. 1, p. 9.

[3] *N. Y. Assembly Docs.,* 1902, vol. 13, No. 36. The commission to revise and codify the laws relating to the Municipal Court of the City of New York was designated by the board of justices of that court under L. 1901, ch. 218; it reported January 27, 1902.

[4] L. 1902, ch. 580; superseded by the Municipal Court Code, L. 1915, ch. 279.

An opposing tendency has been at work. In 1910 the commission to inquire into courts of inferior criminal jurisdiction in cities of the first class deplored the fact that "The Charter of the City of New York contains many of the provisions applicable to these courts, and also many penal provisions which have no place in that instrument."[1] In its recommendation that the charter be rid of these elements, it had the support of the New York Charter Commission, which, dropping detailed consideration of the field of the local criminal courts after the advent of the more special investigation, planned to stop the gap until the law on the subject could be integrated separately from the charter by shifting most of the existing judicial provisions of the charter to the proposed administrative code.[2] Partial segregation was actually accomplished later. The Inferior Criminal Courts Act of 1910[3] repealed as many as thirty-eight sections of the charter. The New York City Municipal Court Code of 1915[4] repealed nineteen sections, although it also recognized the continuance of matter affecting the court in the body of the charter. The New York City Court Act,[5] enacted in 1920 as an incident in the plan to revise and resolve the Code of Civil Procedure into

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[1] *N. Y. Assembly Docs.*, 1910, vol. 26, No. 54, at p. 81. The commission was authorized by L. 1908, ch. 211; it reported finally on April 4, 1910.

[2] Report of the New York Charter Commission, March 8, 1909, *N. Y. Senate Docs.*, 1909, vol. 6, No. 27, p. 27.

[3] L. 1910, ch. 659, "An act in relation to the inferior courts of criminal jurisdiction in the city of New York," which it defined to comprise the court of special sessions and the city magistrates' courts.

[4] L. 1915, ch. 279, superseding L. 1902, ch. 580.

[5] L. 1920, ch. 935. Companion statutes, all submitted by the joint legislative committee on simplification of civil practice, were: Civil Practice Act (ch. 925), applying generally to all courts of record; Surrogate Court Act (ch. 928); Justice Court Act (ch. 937); Court of Claims Act (ch. 922); an act amending the county law generally (ch. 921), containing many special provisions for the counties within N. Y. C., but especially for N. Y. County, to which its general terms are not applicable; an act amending the Code of Criminal Procedure generally (ch. 920); an act amending the Judiciary Law generally (ch. 938); and also acts amending the General Associations (Joint-Stock) Law (ch. 915), the General Corporation Law (ch. 916), the General Construction Law (ch. 917), the Executive Law (ch. 918), the Decedent Estates Law (ch. 919), the Condemnation Law (ch. 923), the Civil Rights Law (ch. 924), the Town Law (ch. 927), the State Finance Law (ch. 929), the Real Property Law (ch. 930), the Public Officers Law (ch. 931), the Public Lands Law (ch. 932), the Prison Law (ch. 933), the Personal Property Law (ch. 934), the Legislative Law (ch. 936).

a group of practice acts, brought together the law on that subject but confined its express repeals to parts of the former Code of Civil Procedure. It goes without saying that the intermediate courts which are shared with the rest of the state, even though modified within the area of New York City, are governed by bodies of law which exist outside the charter.

Procedural and penal provisions, even more than judicial organization, invite a weaving of general law in and around the charters of cities. The Charter Commission of 1908-9 took a view that was on all fours with their wish to shorten and to simplify:

> "The present charter contains fully 170 sections which, being penal in their nature, should disappear from the charter proper. Many are repetitions of provisions of the Penal Code or Code of Criminal Procedure, and are altogether needless in the charter. Others so nearly repeat the provisions of one or the other code as to leave the law in doubt, because of the question raised as to which is controlling. Others, in whole or in part, are in neither the Penal Code nor the Code of Criminal Procedure, yet in one or the other code they undoubtedly belong. All penal charter sections have been segregated, and we recommend their re-enactment in a separate chapter of the administrative code until such time as they shall have been properly cared for in the Penal Code or Code of Criminal Procedure."[1]

Yet, in the very next breath, they confessed the inherent difficulty in the way of any attempt wholly to segregate provisions of this kind on one side or the other of the line. "A few penal sections touching matters of peculiar gravity are retained in the proposed charter," their report stated, "for the sake of greater clearness and in order that the charter may adequately depict the entire plan of city government."

The authors of the New York City Consolidation Act of 1882 had sought to straddle the difficulty by a device which has already

[1] Report of the New York Charter Commission, March 8, 1909, *op. cit.*, pp. 17-8.

been the subject of comment in another connection. Certain sections of the Consolidation Act were declared to contain the substance of parts of the Code of Civil Procedure and the Code of Criminal Procedure and not to "be construed as making any new enactment, or as repealing, modifying, amending or superseding any provision of either of said codes, or any amendments thereof * * *."[1] Thus it sought to avoid confusion by keeping the final source of authority in this field single, although, one may add, it was held that the differing language of the Consolidation Act might be used to clarify the meaning of the codes.[2] These provisions did not apply to the penal law, however; as to this the Consolidation Act merely stipulated that the new Penal Code,[3] although already enacted, should be given the same effect as if passed *after* the Consolidation Act.[4] This did not prevent the city charter from serving as an independent source of penal law.[5] It remained possible by special act to make a certain kind of "conduct in the City of New York an offense and to provide for its punishment, even though it would not be a penal offense elsewhere, or would be crime of a higher degree if committed elsewhere."[6]

These peculiar saving clauses of the Consolidation Act were not renewed in the Greater New York Charter. They are not, however, quite bereft of contemporary significance, in view of the principle which has construed the charter as a continuation

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[1] L. 1882, ch. 410, sec. 2143.

[2] Deutermann *v.* Wilson (1888), 15 N. Y. Civ. Proc. Rep., 411.

[3] L. 1881, ch. 676, "An act to establish a Penal Code," passed July 26, 1881, and therefore in process of formation while the Consolidation Act was being drawn finally together.

[4] For a leading case giving this effect, see People *v.* Jaehne (1886), 103 N. Y., 182; see also People *v.* O'Neil (1888), 109 N. Y., 251. But note that People *ex rel.* Van Heck *v.* Catholic Protectory (1885), 38 Hun., 127, aff'd 101 N. Y., 195, held that the Penal Code was not to be regarded as having repealed anything in the Consolidation Act, since "this act was enacted when the Penal Code was within the knowledge and was in the mind of the legislature."

[5] People *v.* Sheridan (1888), 1 N. Y. Supp., 61, 48 Hun., 620 (dropping from Penal Code provision vs. sprinkling salt on streets did not repeal a somewhat similar provision in the N. Y. C. Consol. Act of 1882, although both items were derived from same prior act); People *v.* Rontey (1889), 4 N. Y. Supp., 235, 51 Hun., 640, aff'd 117 N. Y., 624 (Consol. Act provision regarding proprietors of pharmacies not affected by the Penal Code provision regarding clerks in such places, the two being different).

[6] People *ex rel.* Smith *v.* Van de Carr (1903), 86 App. Div., 9.

of the Consolidation Act of 1882. In People *v.* Jensen,[1] for example, a current charter provision, because identical with a section of the Consolidation Act, was held to be affected by an amendment added to the Penal Code in 1884. But the device itself was abandoned. Penalties and procedure have become the subjects of undifferentiated masses of legislation outside as well as inside the charter. How widely a code of procedure must touch the miscellaneous aspects of a large local government may be judged from the fact that, when the old Code of Civil Procedure was broken up in 1920, its subject-matter was distributed into twenty-two acts, of which only five were exclusively practice acts and of which fourteen were chapters of the consolidated laws that the casual view would never associate with judicial procedure.

Legislation for Counties.

Legislation for counties, in view of the fact that those within Greater New York have been nearly stripped of all save judicial and recording functions, has been closely related to the bodies of law which have just been discussed. Like them, it is part of the uncertain context of the charter. The former powers of county boards of supervisors devolved broadly on the Greater City; the delimiting of the boundaries of Queens County in 1898[2] eliminated the last case of overlapping by a county partly within and partly outside the city limits; a constitutional amendment of 1899[3] opened the way for a sweeping clause in the charter of 1901[4] regarding the transfer of county functions.

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[1] (1904) 99 App. Div., 355, aff'd by memo. (1905), 181 N. Y., 571.

[2] L. 1898, ch. 588.

[3] N. Y. Const., 1894, Art. III, sec. 26, as amended November 7, 1899, reads in part: "In a city which includes an entire county, or two or more entire counties, the powers and duties of a board of supervisors may be devolved upon the municipal assembly, common council, board of aldermen, or other legislative body of the city."

[4] L. 1901, ch. 466, sec. 1586: "Any and all of the powers and duties of the several boards of supervisors heretofore existing in any of the counties within the territory of the City of New York not transferred or devolved upon administrative departments, boards, commissions, officers or other functionaries, are hereby vested in the board of aldermen of the City of New York." This was less qualified than the sec. of the same number in L. 1897, ch. 378.

Much of the legislation affecting the counties within New York City is general, or at least ostensibly general. More, perhaps, is frankly special. Such bills need not be submitted to the city authorities, even when they involve a direct city charge,[1] although through friendly intention[2] or mere inattention[3] they have sometimes been put informally before the Mayor. Each year has seen county legislation scattered further afield.

Thus the session of 1920 passed twenty-eight acts that expressly named particular counties within New York City; of these, twenty-two applied to a single county, six named counties in combination. Two other acts, although in form general, were qualified by particular population limits that confined their effect

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[1] See, *e. g.*, McGrath *v.* Grout (1902), 171 N. Y., 7, which held that L. 1901, chs. 704-5-6, making certain offices in Kings County salaried and dependent on city funds, were not special city laws; it was said they did not "affect the city government, its property, or its particular affairs." In 1916, as a phase of the program of the Joint Legislative Committee on the Finances of New York City, a proposed constitutional amendment requiring the submission of bills affecting counties within a city to the city authorities was introduced (S. Int. 602, S. Pr. 634, by Sen. Brown) and passed the Senate April 12 by a vote of 29:20. 18 of the negative votes were cast by New York City members, 15 being Democrats (7 from N. Y. Co., 6 from Kings, 2 from Bronx Co.) and 3 Republicans (2 from Kings, 1 from N. Y. Co.). The opposition included no less than three gentlemen who, then and since, have been the tireless floor leaders of their party and the champions of the city in the Senate. *N. Y. Sen. Jour.*, 1916, p. 1190.

[2] The instances have not been numerous in the aggregate. See table, in Appendix A. In 1922, the Governor submitted a score of county salary bills to the Mayor and followed him in disapproving all of them. *Report of the Committee on Legislation of the Citizens' Union*, 1922, p. 16.

[3] L. 1921, ch. 586 (involving a salary increase in the office of the County Clerk of Kings), was, while a bill, sent to the Mayor along with special city bills. The legislative clerk attempted to recall it, alleging a mistake. The Mayor vetoed it, but it received the Governor's signature. *Report* (typewritten) *of N. Y. C. Law Department, Legislative Bureau, on Session of* 1921, p. 9. In 1916, Mayor Mitchel vetoed a bill (later L. 1916, ch. 600) in relation to the liability of the Register in N. Y. Co. for mistakes in official searches. Advised by the Attorney General that it was not a special bill, Gov. Whitman signed it. *Report of Law Department of City of New York*, 1916, p. 39. In view of the evident element of ambiguity in sec. 2 of Art. XII, providing for the local reference of city bills, it is to be regretted that the proposed amendments of this section (such as that defeated at polls in 1922) have not at least gone further in clarifying the meaning of provision. An illustration of the confusion in procedure which such proposed amendment evidently seeks to correct is afforded in People *ex rel.* Boyle *v.* Cruise (1921), 231 N. Y., 639, aff'g 197 App. Div., 705, 189 N. Y. Supp., 338.

largely to counties within the Greater City or on its immediate borders. Two-thirds of the total number involved the fixing of salaries or other compensation, being, with one exception, mandatory as far as the central city authority was concerned; two others involved the fixing of the number of subordinate employees. Such legislation, thrown off at about the same rate at each session, is nowhere assembled. It amends neither the charter nor any large body of general law. Only ten of the thirty acts under consideration, for example, related in terms to the County Law or to other chapters in the Consolidated Laws.

The Problem of a Better Adjustment of Special and General Law.

The survey which has occupied the preceding paragraphs has at least suggested the width and variety of the general legislation that may affect city affairs. Unless express directions are attached, the relations of general law and charter provisions can be decided only upon the basis of the broad principles already stated. Express directions in the general statutes themselves have sometimes mitigated the problem. It is easy to exempt a particular city outright from all or part of an act. It is easy and, in view of the tendency to resolve doubts against general law, more important to make the act expressly inclusive, as: "wherever the provisions of this act are in conflict, either direct or implied, with any provision of any present or future charter, local regulation or ordinance * * * the provisions of this act shall in all cases govern";[1] or, "the provisions of this section shall apply to all cities of the State, including the City of New York;"[2] or, again, "notwithstanding the provisions of such general or special law" as may already exist.[3] But such qualifications are hard-and-fast. Flexible directions are sometimes attempted: as, after stating a certain method of choosing an officer, "or in such other way as the city charter shall designate;"[4] or, to cite another ex-

[1] L. 1913, ch. 774.
[2] L. 1916, ch. 305.
[3] L. 1918, ch. 23.
[4] L. 1917, ch. 523.

ample, "authority designated by the Mayor, unless the charter * * * designates";[1] or, qualifying the whole operation of the act, "nor shall this section have any application to cities in which boilers are regularly inspected by competent inspectors, under the authority of local laws and ordinances."[2]

The concluding example shows that it is not easy to draft a provision that will at once permit a flexible adaptation of the law and at the same time not raise more doubts than it settles. This difficulty, and the prolix and dispersed condition of so much local law, tempts the Legislature to leave the adjustments between general and special legislation to time and circumstance and the implicit rules of construction. The failure to make the relationships express often needlessly aggravates an element of uncertainty which at the best could not be entirely eliminated under any practicable system of local government.

The Common Law as a Source.

In bringing to a close the survey of the sources, other than in special law, of provisions that affect New York City, it is necessary to mention the common law.

Here, also, the law of the city merges without sharply-drawn boundaries into unmapped territory. It is an incompleteness, of course, shared with statute law generally. Although statutory provisions which expressly or impliedly show an intention to exhaust the rule or remedy will usually operate to repeal common law on the point, even though consistent, the Consolidation Act of 1882 was held to allow the persistence of common law. One expression of judicial opinion will illustrate. In Poth *v.* the Mayor, etc., of N. Y.,[3] the Court of Appeals said:

> "While this Court has not before been called upon to determine whether in such actions the plaintiff's damages could be limited by the provisions of sec. 903, it has held, in many of the cases cited, that the provisions of the

[1] L. 1911, ch. 252.
[2] L. 1913, ch. 523.
[3] (1896) 151 N. Y., 16, 23.

> Consolidation Act presented no obstacles to the property owners to pursue all remedies afforded by the common law. In order to arrive at this conclusion, it had to hold, and did hold, that the title[1] of the Consolidation Act referred to applied only to such suits or proceedings in equity to vacate or reduce the assessment as are therein specified * * *."

But the additions which can thus be brought to the written charter are procedural rather than substantive and concern the minutiae where the city touches private property rather than the field of broader governmental powers. For practical purposes, this element of incompleteness in the written charter is not serious.

Summary.

Where, then, are the sources in law of the city government today? It was this question that provoked the examination of the problems of unrepealed special law and of parallel general and special legislation. The discussion has shown the variety of the sources of law affecting New York City. These may be summarized in retrospect in tabular form. Even as a bare indication, neither part of the summary makes pretense of being complete. The first part of the table, outlining the sources in special law, obviously fails to encompass the tangled story of the many partial territorial consolidations, each with its devolution of power, that have gone into the making of the present City of New York. An attempt is made to show something of the chronological relation of the several elements of special law, but it is important to remember that all remain at least potentially effective as sources of the City government. The second part of the table, sketching the sources in general laws, is even less complete. In the nature of things, its headings are no more than loose descriptions and the acts which it names, although among the most important, are merely illustrations. The summary follows:

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[1] *I. e.*, Title 3, "Vacating and Modifying Assessments," found in Ch. XVI, L. 1882, ch. 410.

I. SOURCES IN SPECIAL LAW.

Gr. N. Y. C.	Old N. Y. C.	Consolidated Municipalities	Counties
1. The charter.			
2. Charter amendments.			8. Special acts peculiarly applicable to 5 counties within Gr. N. Y. C., in regard to judicial and other continuing functions.
3. Special acts which, though relating expressly and peculiarly to N. Y. C., have not in terms amended the charter:			
(a) acts since 1897 which have amended neither Charter nor Consolidation Act of 1882;			
(b) acts since 1897 which have in terms amended unrepealed portions of Consolidation Act of 1882, made applicable to whole of Gr. N. Y. C.			
	4. Unrepealed special acts, 1882-1896, which although relating peculiarly to N. Y. C., did not in terms amend the Consolidation Act of 1882.	7. Powers and rights of Brooklyn city, Long Island City, and towns and villages in Queens and Richmond counties, devolved by blanket clause on Gr. N. Y. C.	9. Powers and rights, in regard to discontinued county functions, devolved by blanket clause on Gr. N. Y. C.
	5. Consolidation Act of 1882 and its amendments, 1882-1896, in so far as the provisions of the act were neither repealed expressly nor repealed by inclusion in the charter (in which case they are construed as a continuation of the earlier law); extended to the whole of Gr. N. Y. C. as far as applicable.		10. Powers and rights already devolved upon old N. Y. C. and Brooklyn city in earlier partial consolidations with N. Y. Co. and Kings Co., respectively.
	5a. Perhaps some acts prior to 1882, omitted by Consolidation Act and neither covered nor specifically repealed by it (such being aside from prior acts of temporary application, so-called, omitted from the Consolidation Act as a declared policy).		
	6. The royal charters.		

II. SOURCES IN GENERAL LAW.

Subject Matter	Scope of Application
1. General acts which have amended assembled and organized bodies of law	
(a) relating peculiarly to local governments: General City Law; General Municipal Law; County Law	
(b) relating to proprietary governmental activities shared with other units of government: Tax Law; Election Law; Civil Service Law; Public Officers' Law	All cities
(c) relating to functions which, although local in execution, enjoy a state status: Education Law	*or*
(d) relating to judicial organization and procedural and penal matters: The Penal Law; The Code of Criminal Procedure; The several civil practice acts; The Judiciary Act	Cities of 1st and 2nd classes
	or
(e) relating to particular urban problems treated in acts at least ostensibly general in terms: Rapid Transit Act; Tenement House Act	1st class cities
	or
(f) relating, as amendments, to the numerous subjects of the chapters of the Consolidated Laws of New York.	Cities in some classification, by population or otherwise, which in effect includes N. Y. C.
2. General acts which have not in terms amended any assembled and organized bodies of law.	
3. Common law.	

From these sources flows the law that officers and, indeed, citizens also must know. The uncertainties are seen in three directions: (1) backward, the search for the law, to be sure and conclusive, cannot stop even at 1882 but must go beyond the New York Consolidation Act and, as regards the legislative heritage from the municipalities on Long Island, at least back to the Brooklyn Consolidation Act of 1888; (2) outward, the search is cumbered by irrelevancy, arising, first, in the enactment of special laws needlessly unrelated to the charter and, second, in the frequent failure to minimize, by careful qualification, the necessary evil of overlapping general and local law; (3) inward, by a prolixity of text, which, for all its detail and often because of its detail, is not self-explanatory, as the numerous merely declaratory amendments of the last two decades amply prove.

Is simplification possible? The answer can best be approached by reviewing legislative devices whereby it has been attempted to give the local authorities partial command of the statutory sources of their government.

CHAPTER IV.

ATTEMPTS TO EMPOWER THE LOCAL AUTHORITIES TO CHANGE THE SOURCES.

I. The Scheme of a General Grant of Power Superimposed on Existing Charters—The Municipal Empowering Act of 1913—Did it Confer Local Power to Change Existing Law?—Has it Enlarged the Scope of Local Action in any Respect?—II. Conditional Repeal and the Replacement of Charter Provisions by Ordinances—(1) The Greater New York Charter and the Building Code—The Validity of Conditional Repeal Assumed by the Courts—An Element of Uncertainty Created—Conclusion—(2) Conditional Repeal of Designated Charter Sections, 1901—The Validity of Conditional Repeal Again Assumed by the Courts—But Serious Uncertainties Again Created—Conclusion—(3) Conditional Repeal in the Grant of Power to Change Salaries—The Evolution of the Provision—Early Ambiguities—The Uncertain Scope of the Provision as Revised in 1901—Proposals to Enlarge Local Power Over Salaries—The Existing Provision as Precedent and Warning—III. Proposed Application of Conditional Repeal in a Blanket Grant of Power to Reorganize Departments—Judicial Construction of the Optional City Government Law of 1914 in its Relation to Local Power Over the Statutory Sources of Administrative Organization—Conclusion.

Can the Legislature, by conferring on local authorities what is practically the power to set aside the provisions of existing law, find a short-cut past the masses of detail in the charter and in other special laws affecting the City of New York?

The question strikes deeply into the problem of the charter. The ultimate necessity and the greatest difficulty in charter revision lies in the treatment of these masses of statutory detail. Even granted a willingness on the part of the Legislature to repeal them outright in wholesale fashion and to empower the local authorities to deal with such matters as many of them have covered, a further and more serious obstacle remains: some of this legislation cannot be repealed indiscriminately and out of hand, in the absence of affirmative provisions to take its place and without regard to the need of unbroken continuity and smooth transitions in the conduct of city affairs. The difficulty

points to the desirability of schemes whereby the Legislature, without assuming either the risk of immediate and sweeping repeal or the task of considering and mulling over the details itself, can empower the local authorities to change the statutory sources of their government by a more gradual process of replacement.

The problem here presented can best be considered by reviewing past attempts. It is necessary to examine, in the first place, the attempt to superimpose a blanket grant of power upon existing city charters. In the second place, coming nearer to the heart of the problem, it is necessary to examine the uses of what may be called conditional repeal, whereby certain parts of the charter or of other special laws affecting New York City have been repealed contingently upon their replacement by local ordinance. The consideration of the past uses of this latter device (in connection (1) with building laws under the Charter of 1897, (2) with a number of designated charter sections under the Amendatory Act of 1901, and (3) with the salary-fixing power) leads finally to an examination of the proposal, closely related to the foregoing, that the city authorities should be empowered to reshape administrative organization irrespective of existing law.

I

The Scheme of a General Grant of Power Superimposed on Existing Charters—The Municipal Empowering Act of 1913.

The expedient of a pervasive and corrective grant of power, poured by a general act through the interstices of existing charters, was notably illustrated in the Municipal Empowering Act (or, to use its less accurate popular name, the Home Rule Law) of 1913.[1] Although its purposes embraced all cities in the State

[1] L. 1913, ch. 247, constituting Art. 2a (secs. 19-24, incl.) of the General City Law, which is ch. 21 of the Cons. Laws. The act has since been amended by L. 1917, ch. 483, adding 3 subdivisions to sec. 20, 24 (power to regulate the height of buildings, etc.), 25 (power to restrict the location of trades and industries), and 26 (stating that the two previous subdivisions should not apply to cities of 1st class having population above 240,000 and less than 450,000). It should be noted that L. 1914, ch. 470, adding secs. 242a and 242b to the New York City charter, had already conferred the so-called zoning power on that city specially. Sec. 20a was added to the General City Law by L. 1921, ch. 230, author-

and although its results, as far as judicial construction goes, must be traced largely in the affairs of smaller places, this act must be reckoned with by the student of the statutory sources of New York City government in search of methods whereby elements of flexibility can be introduced.

It facilitates an understanding both of the purpose that was set for the Municipal Empowering Act before its passage and of the difficulties that embarrassed its operation afterward to have in mind the point of view of its sponsors. They drew a distinction between power and the agencies whereby it is exercised. They minimized the fact that in any city under an existing legislative charter, powers are mostly vested not in the municipal government as a whole but in particular parts thereof and that for this reason power and the means of its exercise are inextricably confused.[1] An example of the viewpoint behind the

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izing the establishment of purchasing departments, but cities of the 1st class over 1,000,000 were expressly excluded. The Municipal Empowering Act was largely the result of the joint endeavors of the Municipal Government Association (incorporated in 1912) and the Conference of Mayors, which, at its third annual meeting in June, 1912, passed the following resolution: "That the Mayors' Conference urge upon the legislature the grant of broad, general powers to all city governments in the State, to the end that each city may have sufficient power to actually control its own affairs." Although its enactment was doubtless facilitated by the unusual circumstance of Democratic control in all branches of state government, the final passage of the Municipal Empowering Act did not show partizanship or even sharp controversy. See, however, the extravagant claims for the act in the Democratic Municipal Platform of 1913. *N. Y. Times,* August 24, 1913, II., 2:2. The legislative history of the act was briefly as follows: introduced February 21 by Sen. Cullen (S. Int. 947, Pr. Nos. 1063, 1560), and in Assembly by Assemblyman Levy (Ass. Int. 1265, Pr. Nos. 1369, 1804). The latter, after minor amendments, passed first, March 20, by a vote of 129:00 (*Ass. Jour.,* 1913, p. 1344), but upon arrival in the Senate (as Rec. 344) was laid aside in favor of the Senate bill, which, after some amendments, passed March 26 by a vote of 43:3, those in the negative being Murtaugh, D., Elmira, Argetsinger, R., Rochester, and E. R. Brown, R., Watertown (*Sen. Jour.,* 1913, p. 916). As Rec. 218, this passed the Assembly March 27, without amendment, by a vote of 131:00 (*Ass. Jour.,* p. 1629). It was approved by Governor Sulzer April 10, 1913. In view of Sen. Brown's opposition and his relation later, as chairman of the Joint Legislative Committee for the investigation of the Finances of the City of N. Y. (1916), to empowering legislation, it may be noted that he carried his opposition to the Municipal Empowering Act to the point of introducing, April 28, 1913, a bill (S. Int. 1818) which proposed to repeal the new act; it naturally died in committee (*Sen. Jour.,* 1913, p. 1739).

[1]On this point see H. L. McBain, *The Law and the Practice of Municipal Home Rule* (1916), p. 111; also *American Municipal Progress and the Law* (1917), by the same author, at p. 6.

Municipal Empowering Act may be cited. Consciously speaking for "the little group of men in this State who have made the term 'municipal home rule' have the meaning and vitality attained by it in the last few years," the then secretary of the City Club of New York said in 1915:[1]

> "Far from pursuing the loose theories, to call them no worse, followed in some of the western states, we have pursued a diametrically different policy. The West has placed its entire emphasis upon the right of a city to control the form of its municipal organization. Those of us in the State of New York who have been working on this problem recently have put our whole emphasis upon the fact that home rule is essentially a question of the breadth and sufficiency of the legal powers with which a municipal corporation is clothed. Therefore, long before we thought of raising seriously the question as to the form of municipal organization, we sought to establish, for the first time in the history of the State, a common pool of municipal powers which each city shared with every other city. That was the object and partial accomplishment of chapter 247 of the Laws of 1913."

The act, in its initial clause (sec. 19) declared that: "Every city is granted power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power,

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[1] Robert S. Binkerd, *in Proceedings of the Academy of Political Science*, January 1915, vol. V, no. 2, p. 72. Mr. Binkerd added in the course of his remarks: "It is not possible, without constitutional change, to pursue this program to its ultimate conclusion * * *." See also the interpretation given by Laurence A. Tanzer, who, as counsel of the Municipal Government Association, was the chief draftsman of the act, "Legislative Interference in Municipal Affairs and the Home Rule Program in New York," *National Municipal Review*, October, 1913, vol. II, no. 4, p. 602. See also a book by the former secretary of the Municipal Government Association, Walter T. Arndt, *The Emancipation of the American City* (1917).

or to exclude other powers comprehended within this general grant." The next section with its twenty-three subdivisions conferred, "subject to the constitution and general laws," a number of powers which, although entitled specific, were in fact so broadly drawn and necessarily so miscellaneous in content that their reproduction in any summary is impossible. The exercise of powers under the act was hedged about, finally, by fairly exact restrictions (inapplicable to the exercise of an existing power) upon procedure in the incurring of obligations and in the disposal of city real estate and franchises (sec. 23,2). Two provisos qualified the entire act. One (sec. 21), a definition, stated: "The terms 'public or municipal purpose' and 'general welfare,' as used in this article, shall each include the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all the purposes enumerated in the last preceding section." The other (sec. 22), a saving clause, provided: "The powers granted by this article shall be in addition to and not in substitution for, all the powers, rights, privileges and functions existing in any city pursuant to any other provision of law."

Did the Municipal Empowering Act Confer Local Power to Change Existing Law?

From the standpoint of the present study, the most interesting problem in the operation of the act was whether it enabled local ordinances to supersede the written provisions of state law. The language permitted, if it did not invite, confusion on this point. The troublesome phrases may be recalled.[1] In the absence of provision of law or ordinance (according to sec. 23), the local legislative body was to determine the agency which was to exer-

[1] The exact text of sec. 23, subd. 1 read: "The powers granted by this act are to be exercised by the officer, officers or official body vested with such powers by any other provision of law or ordinance (subject to amendment or repeal of any such ordinance) and in the manner and subject to the conditions prescribed by law or ordinance (subject to amendment or repeal of any such ordinance), but no provision of any special or local law shall operate to defeat or limit in extent the grant of powers contained in this act; and any provision of any special or local law which in any city operates, in terms or in effect, to prevent the exercise or limit the extent of any power granted by this article, shall be superseded. Where any such provision of special or local law is superseded under the

cise any particular power drawn from the act. Where, however, law or ordinance had already vested "such power" in the hands of some agency, the new power should be carried on by it and in the manner already provided, "but no provision of any special or local law shall operate to defeat or limit in extent the grant of powers contained in this act; and any provision of any special or local law which in any city operates, in terms or in effect, to prevent the exercise or limit the extent of any power granted by this article, shall be superseded." Yet even when thus "freed from the limitations imposed by such provision," the power in question was to be carried on by the same body in whose hands it would lie if nothing were superseded.

The authors of the act, in truth, claimed for it no revolutionary effect upon the power of city councils over the express provisions of existing charters.[1] If their viewpoint, with its fancied distinction between power and the means of its exercise, had been kept in mind, it should not have been difficult to construe the intent which was shadowed in these phrases, however serious might be the obstacles, constitutional and practical, in the performance of the theory. Did it not mean that, imagining powers as fluids and the various agencies of city administration as the pipes through which they flow, no rearrangement of existing pipes was contemplated but that, where some power already flowed and was restrained by some internal obstruction from reaching the extent to which the level of the new reservoir would drive it, such obstructions might be disregarded? But what sort of obstructions? And how could they be brushed aside without involving the repeal of state law by local ordinance? The one easily conceived application of the

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provisions of this subdivision, such power, freed from the limitations imposed by such provision, shall be exercised by the same officer, officers or official body that would be vested with the same under the provisions of this subdivision, if such provision had not been superseded, but the exercise thereof shall be subject to the limitations provided for in subdivision two of this section."

[1] See, for example, the moderate statement by L. A. Tanzer, *op. cit.* p. 602, "This grant of power is not in substitution for, but is in addition to existing powers and fills up gaps in powers now existing in any city. Every existing power is to be exercised in the manner now provided in the charter of the city * * *."

provisions already quoted, which would not involve the local repeal of the express terms of law, would have been to hold that an existing charter grant of a power to some particular agency no longer could create an *implied* restriction against the further grant by ordinance of power along the same line.

Judicial construction soon frowned down the notion that the Municipal Empowering Act permitted the alteration of existing charters without further legislative action. For a little space the idea seemed to have official sanction in an opinion of the Attorney General to the Legislature on April 30, 1913, and the Governor was so persuaded of the corrective efficacy of the new legislation that he vetoed eighty-five and signed only sixty special acts relating to municipal affairs. Within two months, however, the Attorney General (advised, it may be said, by the sponsors of the act) shifted his ground and took a position on delegation of legislative power which was as unfortunately narrow in the other direction.[1]

Two early cases failed to be conclusive. Hammitt *v.* Gaynor,[2] it is true, held that the Municipal Empowering Act did

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[1] *Opinions of the Attorney General of New York*, 1913, vol. II, pp. 375-82, reproducing an address before the Annual Conference of Mayors on June 5, 1913. The argument of Attorney General Carmody centered upon the unconstitutionality of any delegation of legislative power (although it did not pause here to explain the large police power already possessed by city councils), rather than upon the competence of the legislature to delegate an undefined power to undo what it has expressly done. Shortly after, the Attorney General held that the Common Council of Kingston could not put the city marshal, who received fees under L. 1910, ch. 647 (amending the charter), on a salaried basis; the ground given, however, is that even the legislature could not by special act increase or decrease fees during the term of office (Art. III, sec. 18). *Op. cit.*, pp. 677-9. In 1916 the State Comptroller cited the address of June 5, 1913, as his authority for holding that the council of Glen Falls could not fix the salary of the city chamberlain at an amount in excess of the salary named in the charter, yet even then he did not seem to grapple with the vital issue, saying instead: "My conclusion is that the fixing of salaries is not one of the powers conferred generally or specifically by ch. 247 of the Laws of 1913, and that the provision of the Glen Falls charter mentioned above, has not been superseded." Opinions of State Comptroller, 1916, in 9 *State Dept. Rep.*, 466, 467.

[2] (1913) 144 N. Y. Supp., 127, 82 Misc., 196, aff'd without opinion (1914) 150 N. Y. Supp., 1089, 165 App. Div., 909. The special act involved was L. 1911, ch. 669. The subdivision of the Municipal Empowering Act in point (sec. 20, subd. 20), provided: "(every city is empowered) * * * To provide methods and provide, manage, and administer funds for pensions and annuities for and retirement of city officers and employees."

not supersede an act of 1911 which had prescribed the conditions under which members of the Board of Estimate and Apportionment in New York City might retire employees; but the court was able to point, and it did point, to the fact that in any event no local action had yet been taken to supersede the law of 1911; the dictum, which pointed in the direction of the power to repeal, may therefore be disregarded. Gibbs *v.* Luther[1] decided that the Municipal Empowering Act did not by its grant of power over streets supersede provisions in the charter of Olean which required certain preliminaries in street opening. Although the opinion held flatly enough that "the Home Rule Bill grants powers in addition to and not in substitution of the charter provisions, and is intended to supply omissions," the bearing of the decision upon the immunity of statutory provision from local repeal was obscured by the concern of the court at the dangerously unrestricted power which the Municipal Empowering Act would give the common council over property owners in all matters of street opening and by the court's belief that purely legislative powers cannot be delegated.

Geneva *v.* Fenwick[2] was more completely decisive. In holding that the act did not authorize the common council of Geneva to take action which would validate a bond issue against which irregularities under the existing charter provisions were alleged, the Court said:

> "I do not believe that by the enactment of the 'Home Rule Bill' (so-called) the Legislature intended to confer on municipalities the right to over-ride plain charter pro-

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[1] (1913) 143 N. Y. Supp., 90, 81 Misc., 611, aff'd (1913) 158 App. Div., 951, 143 N. Y. Supp., 1118. The judicial brows lifted a bit at the idea of home rule; the tone was faintly sarcastic.

[2] (1913) 159 App. Div., 621, 626, 145 N. Y. Supp., 884. The decision is of added interest because Gov. Sulzer had vetoed a bill in the session of 1913, proposing to validate the bond issue, his reason being that such act was unnecessary in view of the enactment of the Municipal Empowering Act. Although it is not directly in point, it is interesting to note that in 1918 the legislature passed in both houses a proposed constitutional amendment (S. Int. 1151, by Mr. Sage), attempting to add in the section (Const., Art. 3, sec. 18) which enumerates matters on which private and local bills may not be passed, two items, one of which forbade the legalizing of procedure in municipal bond issues by special act. It was not re-enacted by the session of 1919.

visions, ample and efficient to accomplish a given purpose. To hold other would be to invest municipalities with the right to frame their own charters and to utterly disregard special powers conferred upon them by the legislature. It seems to me that the powers granted by the Home Rule Bill were not in substitution of the powers, rights and privileges existing in any municipality pursuant to any existing provision of law. Where charters are complete and contain all necessary powers to attain a given purpose, it is idle to invoke the aid of the act referred to."

Has the Municipal Empowering Act Enlarged the Scope of Local Action in Any Respect?

But it may be asked whether, even if the Municipal Empowering Act has not opened the way for the remaking of charters locally, there have not been fields relatively disentangled from existing statutory detail in which the scope of city powers has been enlarged and resort to special declaratory amendment made unnecessary. The answer is not easy. In so far as the act of 1913 has been one of the factors making for a more liberal construction of municipal powers,[1] it may have been at work even in situations in which it has not been mentioned, and it is impossible to measure its influence. Direct resort to it has been infrequent, if one may judge by the seemingly unchanged number of special city bills which have been introduced and passed in the sessions since 1913[2] and by the small number of adjudicated cases which have involved it.

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[1] For a summary of conflicting current tendencies in the law of municipal corporations, see H. L. McBain, *American Municipal Progress and the Law* (1917), ch. II, "The Rule of Strict Construction," concluding: "* * * it is open to question whether it may be said that the rule is gradually being broken down. It is a difficult task to weaken the force of a long-standing rule of law. From the cases that have been under review, nevertheless, it would seem that important inroads are being made upon the rigidity with which the rule of strict construction has been applied" (p. 57).

[2] A study of the number of bills at Albany shows that although the number of special city bills introduced, passed and signed fell off in 1914 and 1915, the decline was temporary; furthermore, in 1914, it was no greater proportionately than the falling off in the legislative output on all subjects.

A few cases which have pointed toward enlarged power claim attention first. Mollnow *v.* Rafter[1] and *Matter of* Christey[2] held, in different connections, that under the Municipal Empowering Act[3] cities might pay claims that admittedly they were not competent to settle under their existing charters.

Other cases[4] which have expressly considered the Municipal Empowering Act as a factor in city power, and which have sustained the city's action, decided little on the point in question, since they ended by holding that local authority was already forthcoming under existing law.

Hellyer *v.* Prendergast is especially instructive because it illustrates that, in New York City at least, the charter already contains general grants of power and elastic clauses which can be stretched nearly, and perhaps quite as far as the provisions of the Municipal Empowering Act. The ordinance in dispute was attacked on the grounds that the charter gave the department of health full jurisdiction over its employees. In upholding the ordinance, the court relied, not merely on the Municipal Empowering Act,[5] but on an elastic clause which caps the enumeration of powers of the Board of Aldermen in the char-

[1] (1915) 89 Misc., 495, 152 N. Y. Supp., 110, involving the power of the city council of North Tonawanda to pay a judgment (with expenses) against a policeman who had been sued for using force in making an arrest. The power of the city to pay the judgment against the policeman was in this case denied, however, on the grounds that it would constitute a gift and as such would be contrary to Const. Art. 8, Sec. 10.

[2] (1915) 92 Misc., 1, 155 N. Y. Supp., 39, involving the power of Buffalo to pay the expenses of the city auditor in a suit in which he successfully defended his right to keep the office.

[3] The item in the Municipal Empowering Act in point was: "(every city is empowered) * * * to pay or compromise claims equitably payable by the city, though not constituting obligations legally binding on it" (L. 1913, ch. 247, sec. 20, subd. 5).

[4] Hellyer *v.* Prendergast (1917), 176 App. Div., 383, 162 N. Y. Supp., 788 (sustaining a New York City ordinance providing that only citizens and actual residents of the city should be appointed in the several departments); City of Buffalo *v.* Till (1920), 192 App. Div., 99, 182 N. Y. Supp., 418 (sustaining an ordinance forbidding street speaking without mayor's permit as valid anyway under charter); People *ex rel.* Economus *v.* Coakley (1920), 110 Misc., 385, 180 N. Y. Supp., 386 (sustaining Utica's power to license pool halls as probably valid in any event under the Second Class Cities Law).

[5] Sec. 20, subd. 17, "(every city is empowered): * * * To determine and regulate the number, mode of selection, terms of employment, qualifications, powers and duties and compensation of all employees of the city and the relations of all officers and employees of the city to each other, to the city and to the inhabitants."

ter, stating in part that the board shall "pass all such ordinances * * * as to the said Board of Aldermen may seem meet for the good rule and government of the City."[1] Any new broad grant was a matter of carrying coals to Newcastle.

Against these affirmations or half way affirmations must be set several outright refusals to allow cities to draw new powers from the Municipal Empowering Act. Two of the cases rested upon the ground that the mooted ordinances involved general legislative power. In deciding that Yonkers could not penalize Sunday exhibitions by fine or imprisonment, it was said that "the additional powers granted by chapter 247 of the Laws of 1913 * * * did not, and could not, surrender the general power to legislate against criminal offenses, which remains in the Legislature."[2]

So, too, a New York City ordinance which sought to regulate the selling and reselling of theatre tickets was invalid despite the City's appeal to the broad grant with which the Municipal Empowering Act begins. Justice Greenbaum said:[3]

> "It was doubtless the intention of the Legislature by that section to overcome the effect of the former strict rule of construction which limited the powers of a municipal corporation to those expressly granted by extending them to all matters with which it may deal under the general grant of power conferred by the charter, even if they may not have been specifically enumerated therein. But assuredly this liberal construction of the charter as to the powers of the city may not be held

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[1] L. 1901 ch. 466, sec. 44, as amended L. 1905, ch. 629, sec. 5.

[2] People *ex rel.* Kieley *v.* Lent (1915), 166 App. Div., 550, 551, 152 N. Y. Supp., 18, aff'd 215 N. Y., 626. The provision of the Municipal Empowering Act which was appealed to reads (sec. 20): "(* * * every city is empowered) * * * 22. To regulate by ordinance any matter within the powers of the city, and to provide for the enforcement of ordinances by legal proceedings, to compel compliance therewith, and by penalties, forfeitures and imprisonment to punish violations thereof."

[3] *Matter of* Gilchrist (also by same opinion *In re* Newman) (1920), 181 N. Y. Supp., 245. 246. 110 Misc., 362. The ordinance in question, approved December 13, 1918, as sec. 11a of ch. 3, Art. I of Code of Ordinances, not only required a license fee of $250.00 to sell tickets, but specifically stated that the resale price should not be more than fifty cents over the regular rate as printed on the ticket.

> to confer general legislative power upon the municipality. The business of selling tickets is not a matter which would fall within the scope of any duty or power implied in the charter."

Another case[1] brushed aside the Municipal Empowering Act, as it did the royal grants, as a source of local power to compel the relocation of street railway tracks in New York City, although it admitted that the legislature might extend its police power to the matter and although the legislature did deal with the situation by a very specific charter amendment in the next year.

Two recent cases have given a narrow construction to the term "municipal affairs" as employed in the Municipal Empowering Act. Could the City of New York operate motor-bus lines? When the question was presented in Brooklyn City R. Co. *v.* Whalen,[2] the City's representatives pointed both to the Municipal Empowering Act and to the existence of an emergency. Justice Blackmar denied authority, saying in part:

> "It would be futile to attempt a definition of what constitutes 'local affairs' within the meaning of the act. But one thing, I think, may be safely said, and that is

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[1] People *ex rel.* City of N. Y. *v.* N. Y. R. Co. (1916), 217 N. Y., 310, 313; Cardozo and Seabury, JJ, dissenting on the ground that the existing local control over streets carried with it a grant of police power. The majority opinion did not draw the line between the charter and the Municipal Empowering Act as possible sources of authority in the matter. The charter amendment which corrected the situation was L. 1917, ch. 692, adding sec. 242c. For a discussion of the bearing of the case on present-day efficacy of the royal grants, cf. *supra*, p. 58.

[2] (1920) 182 N. Y. Supp., 283, 285, 191 App. Div. 737 (aff'g 181 N. Y. Supp., 208, 111 Misc., 348), and aff'd by memo. only, 229 N. Y. 570. The law department of New York City, on January 9, 1920, 56 *Op. of the Corp. Counsel* 34, had advised that the Municipal Empowering Act was in itself ample basis for the municipal operation of motor bus lines. Another opinion that had declared power to act was that of May 24, 1920, vol. 56, p. 537, involving the taking over of a discontinued ferry between 92d street and Astoria. So, too, an opinion of December 3, 1918, vol. 53, p. 655, approving, *inter alia*, a proposed ordinance involving the licensing of rapid transit employees. The latter virtually over-ruled an earlier opinion, September 30, 1916, vol. 49, p. 315, on a related point. But, on the other side, see the opinion of April 8, 1919, vol. 54, p. 436, advising that power to pass an ordinance that proposed a municipal milk distributing plant did not exist under the Municipal Empowering Act.

> that the power to control 'local affairs' does not add new powers to the corporation. The act refers to local affairs which were such at the time the act was passed in 1913. Certainly municipal operation of bus and stage lines was not a local affair at that time."

People *v.* Dibble[1] was the more striking in the narrow construction which it gave to the Municipal Empowering Act, for, in denying that Schenectady could establish a scheme of group insurance for its employees, it contracted the operation of the act in one of the peculiarly proprietary phases of government. "This insurance," said the Court, "has no relation to the public health, public morals, or the public safety, nor any of the other objects which come within the scope of the city's power. Attention is called to the granting of pensions to city employees, but it will be noted that in such cases the action of the city authorities is provided for by legislative enactment."

Both of these decisions were marked by what one of the most acute students of constitutional law is fond of calling "the parade of the horribles." In Brooklyn City R. Co. *v.* Whalen, it was said:

> "We cannot close our eyes to the far-reaching nature of the argument of the Corporation Counsel. If the Home Rule Act authorizes municipal operation of common carrier lines, it is difficult to see any limit to its scope. The city could do whatever its existing officers thought for the general welfare. The line of argument that the Home Rule Act empowers the City to operate stage lines of motor vehicles in order to promote the welfare of citizens would with equal force apply to establishing municipal markets, municipal department stores, municipal drug stores, or any other enterprises which the officials in power conceived would be in the interest of public welfare. No such meaning can be given to the act. It must be inter-

[1] People *ex rel.* Terbush & Powell *v.* Dibble (1921), 189 N. Y. Supp., 29, 31, aff'd by memo. only, 196 App. Div., 913, 186 N. Y. Supp., 951, aff'd by memo only 231 N. Y., 593 (the Court of Appeals holding, it should be added, that the record was inadequate to decide the main question).

> preted consistently with the fundamental principle that the powers of corporations, both municipal and private, are such only as are granted expressly or by necessary implication in the laws which constitute the charter. From this use of words of indefinite import, like 'general welfare,' defined to include 'the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort, and convenience' (sec. 21, Home Rule Act), no implication can be drawn of a grant of power to cities in the state to assume those activities which according to our conception of government founded on the principle of individualism, are left to private enterprise."

The Court did not suggest that the deepest pit of hell at least might be fenced about by resort to the crude, indefinite, changing, but practical distinction which the law has already drawn between ordinary business and enterprises which are affected with a public interest. Nor has the grim parade been limited to the area shadowed by the Municipal Building of the Greater City. "If this system of insurance is upheld," said another court in People *v.* Dibble, "there is no reason why the City may not hire the houses for its employees, provide for their clothing, while in the employment of the city, or make any other provisions for them, and that entirely outside of anything directly connected with their employment or their duties." The Court did not advert to frequent use of group insurance in private industry; it becomes socialistic for government to use a current device of employment management and to do for its employees what competitive enterprise does as a matter of successful business.

Such has been the outcome of the attempt to relieve the legislature and to liberate the cities by thrusting a broad grant of power beneath the fabric of existing charters. It has not given cities the right to alter matters expressly governed by statute. It has not become (and here has been its primary failure from the standpoint of its authors) a source of substantially enlarged power. Under these circumstances, it could contribute little to New York City, already more richly empowered than

the run of cities, although under a charter and other special laws of indescribably detailed content.

II.

Conditional Repeal and the Replacement of Charter Provisions by Ordinance.

Attention may now be turned from the wholesale method of relief treated in the preceding section to a device which, on a limited scale, has been applied in the revision of the New York City charter. This device consists in the repeal of certain provisions of the charter or of other special laws conditionally upon the later enactment of local ordinances that cover their subject matter. The instances of its actual application to New York City have been: (1) to the laws relating to building regulation, under the charter of 1897; (2) to forty-six sections of the charter, involving miscellaneous matters, under the Amendatory Act of 1901; (3) to the fixing of salaries irrespective of existing law (construed to mean laws enacted prior to 1902), under both the original Greater New York Charter and the revised charter of 1901. The analysis of these uses of conditional repeal will lead, in the concluding section of the present chapter, to the consideration of the proposal that the local authorities should be empowered to change departmental organization and in this connection to set aside the provisions of existing statutory law.

The Greater City Charter and the Building Code.

Why did the Greater New York Commission adopt an unusual procedure in regard to the laws affecting building control and why, with this procedure before them, did they not carry it into other phases of city government? The answer is suggested in the Commission's own words:[1]

[1] Report of the Greater New York Commission to the Legislature, Feb. 18, 1897, as reproduced in Birdseye, *The Greater New York Charter, annotated* (1897), p. xxxii.

> "To have adopted for such a city what may be described as a skeleton charter, would have been to have left to the local legislature the framing of ordinances that should be the fundamental law for all the vast interests thus to be consolidated into a single government. In connection with the building department, the commission has done this, partly because it was clearly impossible to extend the building laws of the present City of New York over territory presenting such widely different conditions, and partly because the commission were unwilling to venture upon original legislation as to a subject at once so intricate, so technical, and yet so important. Moreover, few subjects afford, it is believed, a more appropriate field for local regulation. The charter, therefore, provides that the existing building laws shall stand in all parts of the consolidated territory until superseded by a municipal building code, and the municipal assembly is given authority to employ experts in the preparation of such a code."

The plan was embodied in sec. 647, which without attempting even to list, let alone to assemble and reproduce the legislation in question, declared that the various acts then in effect "concerning, affecting, or relating to the construction, alteration or removal of buildings or other structures in any of the municipal and public corporations included within the City of New York as constituted by this act" should continue in full force. It authorized the municipal assembly "to establish and from time to time to amend a code of ordinances, to be known as the 'building code,'" providing for all the matters already described, and it stipulated that "upon the establishment of such code the several acts first above mentioned shall cease to have any force or effect, and are hereby repealed * * *."

In accordance with this mandate, a body of ordinances was enacted and approved on October 24, 1899, and took effect on December 23 of the same year. "This ordinance," its opening lines declared, "to be known and cited as the Building Code and presumptively (to) contain the building law,

except so far as such provisions are contained in the charter * * *."[1] Under a charter amendment of 1904,[2] it became a chapter in the general code of ordinances. The story of the efforts to revise it—finally completed in 1916, after a decade of costly failure[3]—does not concern the present point except in so far as it indicates the complicated and controversial subject-matter of which the device under discussion had largely rid the charter.

The Validity of Conditional Repeal Assumed by the Courts.

In turning to the construction which this instance of conditional repeal has received in the courts, it must at once be pointed out that the revision of the charter in 1901[4] very nearly removed whatever legal difficulties may have inhered in the original provisions. The Building Code as it stood on the first day of 1902 was expressly confirmed and it and provisions of law fixing penalties under it and "all then existing law affecting or relating to the construction, alteration or removal of buildings or other structures" were continued in full force. In practice, this would have stilled doubts, had they existed, because the transmutation of law into ordinance was largely accomplished. In theory at least, however, the charter of 1901 authorized the process to continue; it did this, furthermore, in language of which—if it were not a probable inadvertence—something could

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[1] Sec. 1 of Pt. I, A, as given in Ash, *The Building Code of the City of New York*, with notes (1899), p. 1.

[2] L. 1904, ch. 628, sec. 2. Under the revision of the code of ordinances which was approved September 12, 1916, it constitutes ch. 5 and comprises 32 articles and several hundred sections.

[3] *Report of the Building Bureau of Manhattan*, 1916, p. 15. The connection of a veteran civil servant, Rudolph P. Miller, as engineer of the Board of Aldermen's Committee, with the eventual success is well known. The final plan was to put the revision through the Board of Aldermen article by article. Mr. McAneny spoke in 1915 of "something like three hundred thousand dollars futilely spent upon it" in the previous, abortive revisions during a decade. *Proceedings of the Academy of Political Science*, April, 1915, vol. V, No. 3, p. 224. Other estimates put the total cost as high as half a million dollars.

[4] L. 1901, ch. 466, sec. 407.

be made in arguments supporting the competence of the legislature to delegate charter amending power. "The Board of Aldermen," it was said, "shall have power from time to time to *amend* said building code and *said laws* and to provide therein for all matters concerning, affecting or relating to the construction, alteration or removal of buildings or structures * * *."[1]

The cases in which the courts have construed the sanctions of the Building Code do not seem to date back of 1903. The question of the legality of the process whereby the code first replaced an existing body of law has not been directly presented; its validity has been assumed, rather than argued, and it has been easy to beg the question by pointing to the confirmation written into the charter of 1901. The leading case, City of New York *v.* Trustees of Sailors' Snug Harbor,[2] centered on the question whether the power to require the construction of fire escapes on factory buildings lodged with the borough superintendent of buildings or the state labor department. Before 1897, it was pointed out, the more general terms of the State Labor Law had been ousted in the area of New York City by special laws on the subject of building control. Had the situation in this respect been altered by the replacement of these laws by the Building Code ordinance, especially in view of the charter proviso that "the provisions of such 'building code' shall be in conformity with and be subject to all general laws of the estate (*sic*) concerning, affecting, or relating to buildings, or classes of buildings, or other structures?"[3] In deciding that the situation had not been altered and that the labor law did not operate, Justice O'Brien touched on the validity of the method by which the Building Code had been adopted. Without in any way implying doubt as to the soundness of that method, he cut the knot by saying: "In view of this ratification by the Legislature of the power to enact the Building Code, we

[1] *Ibid.* Italics are the author's. It need not be pointed out that the original provision in 1897 did not in any legal sense give the Board of Aldermen power to amend state laws regarding building; the Board did nothing to the laws; the Legislature itself repealed them contingently.

[2] (1903) 85 App. Div. 355, 361, 83 N. Y. Supp. 442, aff'd. (1905) 180 N. Y. 527.

[3] L. 1897, ch. 378, sec 647. This provision is not repeated in the 1901 charter.

fail to see why the Building Code should not be given the same force within the corporate limits as the statute passed by the Legislature itself." Later cases,[1] citing this, have indulged in even less argument.

Nevertheless, in so holding, the courts have never suggested that the Building Code has occupied a different status from that of ordinances generally. "But, although given the force of law," it was said by Justice Scott in declining, on a technically procedural ground, to apply it to the situation at hand, "the Building Code remains nothing more than an ordinance of which the court cannot take judicial notice, and which to be availed of must be pleaded and proved."[2]

An Element of Uncertainty Created.

Although doubt was never cast on the validity of the scheme of conditional repeal, an uncertainty existed. What were "all matters concerning, affecting, or relating to the construction, alteration, or removal of buildings or other structures"? How far, under this clause, could the local legislative body extend the boundaries of the field in which it was empowered to complete the conditional repeal of state law by the enactment of ordinances? The problems which were implicit in the phraseology were anticipated by an early annotator of the code, writing before there had been opportunity for adjudication of any kind:[3]

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[1] Messer Co. *v.* Rothstein (1908) 129 App. Div., 215, 113 N. Y. Supp. 772, aff'd, 198 N. Y. 532; Post *v.* Kerwin (1909) 133 App. Div. 404, 117 N. Y. Supp. 761; Racine *v.* Morris (1910) 201 N. Y. 240, aff'g. 136 App. Div. 467, 121 N. Y. Supp. 146; City of New York, *v.* Foster (1911) 148 App. Div. 258, 133 N. Y. Supp. 152, aff'd 205 N. Y. 593; People *ex rel.* Van Beuren & New York Bill Posting Co. *v.* Miller (1914) 161 App. Div. 138, 146 N. Y. Supp. 403.

[2] Schnaier & Co. *v.* Grigsby (1909) 132 App. Div. 854, 856, 117 N. Y. Supp. 455, aff'd. 199 N. Y. 577; see also Goetz *v.* Duffy (1916) 171 App. Div. 680, 157 N. Y. Supp. 590, 591, remarking on the same point, "It is a mere code of ordinances." These cases were decided before L. 1917, ch. 382, amended sec. 1556 of the charter by adding, "All courts in the city shall take judicial notice of city ordinances."

[3] Ash, *The Building Code of the City of New York, with notes,* (1899), pp. iii-iv.

> "The construction placed upon this section by the municipal assembly in enacting the code, deserves special mention. The code embraces provisions (secs. 150-156) referring to violations of the sections regulating the construction, alteration or removal of buildings, inflicting penalties for such violations, and regulating the legal procedure to prevent these violations by suit, injunction, etc. These provisions have been taken bodily from the building law contained in the N. Y. C. Consolidation Act (L. 1882, ch. 410), secs. 505-14, as amended by L. 1892, ch. 275, and with slight changes due to the altered situation consequent upon consolidation incorporated in the code. It may be a serious question whether the section of the charter above quoted conferred any legal authority upon the municipal assembly to enact an ordinance covering the subject matter of the sections of the Consolidation Act last referred to."

The justification of these doubts was partially given some years later in City of New York *v.* Wineburg Advertising Company.[1] It was here held that, despite the attempt to include its subject matter in the Building Code, sec. 506 of the Consolidation Act must be regarded as still in force.[2] The Court sustained the contention that an action in equity might be brought to prevent the erection of a sky-sign, on the ground that, although injunction ordinarily will not lie to enforce ordinances,

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[1] (1907) 122 App. Div. 748, 107 N. Y. Supp. 478. The Kobbe Co. *v.* City of New York, ibid., p. 489, involved the same matter and was decided briefly on the basis of the opinion in the Wineburg case.

[2] This decision blocks whatever argument might be drawn from an earlier case, Kenney *v.* Brooklyn Bridge Stores Co. (1904) 121 App. Div. 684. This was a suit to recover damages for a death resulting from a fall through an open hatchway. It was alleged that L. 1892, ch. 275, amending the Consolidation Act of 1882, had been violated by the owner. The Court held that, even if it were in force, the law of 1892 would not apply because it had been intended to protect firemen. It added (in what was dictum since the Building Code had not been argued and proved in court): "It would seem, therefore, that under the express provisions of the charter of 1897, upon the enactment of that building code by the municipal authorities the provisions of the Consolidation Act in relation to the construction of buildings in the City of New York were repealed, and the liability of the defendant, if any, must depend upon the building code in force on Aug. 13, 1903, the date of the accident." (p. 688).

this remedy had been provided by L. 1892, ch. 275, amending sec. 506 of the Consolidation Act. Justice Scott said in part:

> "* * * when the Legislature provided that the building laws formerly in force should be repealed upon the adoption of a Building Code, it meant that those provisions of the Building Code which it was within the power of the municipal assembly to adopt, should supersede and stand in the place of legislative acts covering the same field. If, therefore, the municipal assembly had no power to enact sec. 151 of the Building Code, purporting to provide a remedy by injunction, the section must be treated as if it had not been included in the Code at all, and consequently sec. 42 of ch. 275 of the Laws of 1892, embracing a subject not within the authority of the municipal assembly and, therefore, not validly treated by the Building Code, remained unrepealed."

Conclusion Regarding Conditional Repeal Under the Charter of 1897.

Here was demonstrated the fact that the enactment of the Building Code did not, *ipso facto,* repeal every special law that related in any way to building or even every law the substance of which it sought to include. Here was suggested an obvious automatic relationship, whereby effect is given either to a provision of law or to an ordinance that seeks to cover the subject matter of the provision of law. But neither here nor in an almost simultaneous case[1] that closely followed it did the court undertake to give a definition of the scope of the concept of building regulation or to locate the boundary beyond which ordinances could not go in supplanting pre-existing statutes.

The practical difficulties in the particular situation which has just been discussed were perhaps not serious; they were less important even than they might have been if the ordinance, instead of merely copying, had departed from the substance of the statute that it sought to replace. It would be exaggeration,

[1] *In the Matter of* the City of New York (O. J. Gude Co., App.) (1907) 122 App. Div. 741, 107 N. Y. Supp. 484.

furthermore, to suggest, in thus directing attention to an element of uncertainty in the operation of the scheme of conditional repeal as applied to building laws, that it has at any time proved disturbing. It is obvious, however, that this element must be reckoned with, and must be guarded against in any use of the scheme of conditional repeal upon a wider scale.

Conditional Repeal of Designated Charter Sections, 1901.

The Amendatory Act of 1901[1] listed forty-six sections of the Greater New York Charter and, without itself attempting to reprint them, declared that they should continue in full force until the Board of Aldermen should "pass ordinances regulating the matters provided for in the said several sections." The proviso concluded: "* * * all of which ordinances the said Board of Aldermen is hereby expressly empowered to pass. Upon the passing of any such ordinances regulating the matters provided for in any one of the said sections respectively, such section shall cease to have any force or effect, and the same is and shall be repealed."

This provision represented no careful planning. The Charter Revision Commission did not deem it significant enough to mention in their report. Nor is any consistent criterion of selection evident in the subject matter of the various sections which were chosen from the mass of the charter for conditional repeal. The content of these sections was miscellaneous. (a) Three[2] concerned licensing in connection with boarding houses, immigrant booking agents, and hotel runners; (b) nine involved fire control, of which one[3] regulated the disposal of shavings, etc., one[4] required the maintenance of lights, apparatus, etc., in build-

[1] L. 1901, ch. 466, Section Three (the whole body of the charter, with its numerous "sections," being Section One). This refers to the Second Schedule, appended to the act and bearing the not quite accurate subtitle, "Sections to Remain in Force Until Changed by the Board of Aldermen."

[2] L. 1897, ch. 378, secs. 347, 348, 349.

[3] Sec. 760.

[4] Sec. 762.

ings used by many persons, one[1] required numbering of exits and the printing of floor plans on programs in places of amusement, and the remaining six[2] regulated explosives and combustibles and other aspects of fire prevention; (c) nine concerned the protection of health and the avoidance of nuisances, six[3] enumerated certain noxious products, one[4] relating to the filling of yards and cellars, one[5] to garbage receptacles, and one[6] to the driving and slaughtering of animals; (d) nine touched the control of streets, of which four[7] were very old provisions regarding the breaking of street lamps and knockers, one[8] stated a law of the road, one[9] forbade throwing certain kinds of debris in the streets, one[10] placed restrictions on parades, etc., and one[11] gave a definition of "streets," one[12] conferred power to regulate driving, etc., (e) sixteen[13] concerned the licensing of amusements.

Most of these on their face were necessary but transitory details rather than the essence of power. They were not, however, a whit more detailed and temporary than hundreds of sections which the Commission left untouched in the charter. The inconsistency is the more apparent when it is noted that one of the sections chosen for conditional repeal[14] broadly stated that "the municipal assembly is hereby authorized and empowered to pass ordinances regulating the rate of speed * * * by foot passengers, vehicles and animals"; and that another section[15] in forbidding the driving and slaughtering of cattle, sheep, swine, pigs or calves, permitted wide variations by adding the clause, "except at such times and in such manner as pro-

[1] Sec. 1487.
[2] Secs. 763, 765, 768, 769, 770, 773.
[3] Secs. 1207, 1208, 1209, 1211, 1212, 1213.
[4] Sec. 1214.
[5] Sec. 1223.
[6] Sec. 1227.
[7] Secs. 1462, 1463, 1464, 1465.
[8] Sec. 1455.
[9] Sec. 1456.
[10] Sec. 1457.
[11] Sec. 1466.
[12] Sec. 1454.
[13] Secs. 1472-1486, incl., 346.
[14] Sec. 1454; this section, it is fair to add, contained a definite statement of penalties.
[15] Sec. 1227.

vided in the sanitary code"; and that the section[1] which concerned precautions against fire in places of amusement, although more detailed, left discretion with the fire commissioner at nearly every point. The charter abounds in sections which do not have as much saving flexibility as these.

The Validity of Conditional Repeal Again Assumed by the Courts.

The validity of conditional repeal under the 1901 charter was as little questioned on the main point as had been the Building Code. *In re* City of New York (Morris' License)[2] mentioned the point only to go on to an obvious interpretation of the effect. The Court said:

> "The Legislature, while it might confer power upon the Board of Aldermen to pass ordinances upon the subjects enumerated in said title, could not confer power upon the Board of Aldermen to amend, add to, or change the charter. While the charter provided for a continuation of the said provisions until the Board of Aldermen acted, it was expressly provided that: 'upon the passing of any such ordinance regulating the matters provided for in any

[1] Sec. 762.

[2] (1909) 131 App. Div. 767, 772, 116 N. Y. Supp. 353, involving an ordinance approved Dec. 19, 1907, entitled "An ordinance regulating the matters provided for in section 1481 of L. 1897, ch. 378." Sec. 1481 had been part of Title 2 of Ch. XXII. The penalty provision referred to was Sec. 1486 (also conditionally repealed) which related to "a violation of any of the provisions of this title." Some years before, in an opinion rendered on March 7, 1902, the law department of New York City had advised that certain legislative amendments to secs. 763 and 769, recommended by the Municipal Explosives Commission, were unnecessary, since they could be adopted in the form of ordinances. 12 *Opinions of the Corporation Counsel of the City of New York,* 488. Subsequent opinions dealt with several of the sections listed in Schedule Two, although none dealt incisively with the problems inherent in the application of conditional repeal: sec. 349, May 1, 1915, vol. 46, p. 310, Nov. 12, 1918, vol. 53, p. 586; sec. 762, June 10, 1915, vol. 46, p. 415, June 24, 1915, vol. 46, p. 470; sec. 763, May 6, 1907, vol. 23, p. 558; sec. 773, April 8, 1915, vol. 46, p. 253; secs. 1472-3, Aug. 23, 1904, vol. 19, p. 38, Nov. 27, 1911, vol. 36, p. 350; secs. 1472 and 1487, Nov. 8, 1915, vol. 47, p. 305; secs. 1473-4, March 6, 1903, vol. 15, p. 327; sec. 1481, April 10, 1907, vol. 23, p. 487.

> one of said sections respectively such section shall cease to have any force and effect and the same is and shall be repealed.' It follows that section 1481 has been repealed by the passage of the ordinance, but that ordinance has not been inserted in place of section 1481 in the title from whence it was taken."

On the basis of this reasoning, it may be added, the Court held that a penalty provision applicable to the whole of the original title and not yet displaced from the charter could not be construed as extending to the ordinance. But although the direct connection is broken, the fact that an ordinance displaces a section of the charter may be useful in interpreting the former. In City of New York *v.* Alhambra Theatre Co.,[1] involving the same ordinance and charter section already discussed, it was held that the ordinance was valid despite the presence of a provision on the same subject in the penal law, because the legislature must have been aware of the penal law when it re-enacted section 1481 into the Greater City Charter and, the Court concluded, "The ordinance which has replaced sec. 1481 gives it the same right." The legality of conditional repeal was not questioned.

But Serious Uncertainties Again Created.

But, although clearly sustained in its essential principle, the use of conditional repeal in 1901, as in 1897, left serious uncertainties. Some differences may be noted. The charter of 1901 designated particular sections for conditional repeal, whereas the building code proviso of 1897 repealed, without specific designation, all laws on a broad subject. On the other hand, in dealing with section numbers rather than substance, the charter of 1901 set up no single topic of legislation to serve as a guide in determining the limits of repeal. The phraseology, it will be recalled, read: "Upon the passing of any such ordinances regulating the matters provided for in any one of the said sections

[1] (1910) 136 App. Div. 509, 121 N. Y. Supp. 3.

respectively, such section shall cease to have any force or effect." It requires no straining to draw from this at least the following problems:

(1) Is it necessary that the ordinance shall expressly declare itself to be in regulation of the matters provided for in a particular section,[1] or does the completion of repeal take place automatically whenever an ordinance is enacted which touches upon the subject-matter of one or more of the conditionally repealed sections?

(2) If so, does the repeal of the *whole* of any section take place only when substantially all its subject-matter is regulated by ordinance, or is the whole repealed when a *part* merely is covered, and, in either case, how is the line drawn in determining how apposite the ordinance must be to the subject-matter, and how much of that subject-matter it must cover, in order to complete the repeal of a charter section?

(3) Or, despite the fact that the charter seems to speak only of the repeal of whole sections, can a part of a section remain in the charter while the part that is covered by an ordinance is repealed?

(4) Is it material to the effect of the ordinance in consummating repeal, whether it is consistent with, or repugnant to, the charter section in question? Is repeal to be regarded as effected if the ordinance merely repeats the exact language of the charter provision? if it repeats the substance, but in different words? if it repeats the substance but with minor alterations of meaning?

(5) If a section which was listed in 1901 as conditionally repealed subject to ordinance is amended subsequently by the Legislature, before any ordinance in regulation of its subject matter has been adopted and without any mention of conditional repeal in the amending statute, is the amended section still conditionally repealed subject to ordinance?

It must be said frankly that most of these questions have

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[1] For example, the ordinance involved in *In re* City of New York, *supra*, p. 106, note two.

never been settled in the courts; few aspects of the matter, indeed, have been adjudicated. Some assistance, at least in delimiting the problem, was given in Waldo *v.* Christman.[1] The issue in this case was whether the repeal of sec. 762 of the charter had been completed by the enactment of certain provisions in the Building Code, in point here only as an ordinary ordinance. The Court held that the charter section was not repealed, and suggested a test in the phrase, "comprehensive ordinance."

The opinion may be quoted at some length:

> "It is true that sec. 762 of the charter is included in the Second Schedule referred to in subd. 3 of sec. 1620[2] of ch. 466 of L. of 1901. From this circumstance the argument is made that the enactment by the local authorities of secs. 102 and 109 of the building code superseded sec. 762 of the charter. While a superficial reading of sec. 1620 makes this contention seem plausible, yet we think that upon a closer examination it becomes evident that the legislature did not intend that sec. 762 should be deemed repealed until the local authorities 'shall pass ordinances regulating the matters provided for in the said' section, or 'until' said section should be 'changed by the Board of Aldermen.' A comparison of secs. 102 and 109 of the building code with the provisions of sec 762 of the charter shows very clearly that these ordinances are not co-extensive with the provisions of the charter referred to. Thus the provisions of sec. 102 of the building code relate to fire appliances in buildings of a certain specified height, and are generally much more limited in their scope than are the provisions of sec. 762 of the

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[1] (1911) 72 Misc. 349, 353-5, 130 N. Y. Supp. 260 (also, by the same opinion, Waldo *v.* Winter & Co.).

[2] The Court (erroneously, but not strangely in view of the double use of the term "section" in the charter of 1901) refers to "Section Three" as a subdivision of the last regularly numbered section of the charter, *i.e.*, 1620.

> charter.[1] * * * Sec. 762 of the charter is still in force, and in so far as it relates to the facts of these cases has not been superseded by the building code. The provisions of secs. 102 and 109 of the Building Code are not inconsistent with sec. 762 of the charter. We think that the design of the Board of Aldermen in enacting these sections was to make certain specific provisions which should supplement the provisions of the charter and not to pass a comprehensive ordinance which should regulate 'the matters provided for' in sec. 762 of the charter, or to 'change' the regulations prescribed by the charter provisions. In view of the language employed in sec. 1620 we think that it is evident that the Legislature did not intend that the section of the charter referred to in the 'Second Schedule' should be repealed until comprehensive ordinances, which should substantially provide for the proper regulation of the same subject-matter, should be enacted by the local authorities of the City of New York."

Although this is the statement of an intermediate court only, it may be taken to show conclusively that the mere trenching of ordinance upon the subject-matter of a section listed for conditional repeal is not enough to accomplish repeal. But at what point does an ordinance become "comprehensive"? At what point does it "substantially provide for the proper regulation of the same subject-matter"? The solution offered is as reasonable in its general theory as it is likely to be uncertain in its detailed application. Yet a more exact rule could hardly have been offered unless the courts had chosen, against the normal tendencies of statutory construction, to recognize repeal only where an ordinance expressly offered itself as a regulation of the matters treated in a particular section.

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[1] Citing with approval Lantry *v.* Hoffman (1907) 55 Misc. 261, aff'd 124 App. Div. 937, which, without raising definitely the question of the repeal of sec. 762, had held that under provision of that section authorizing the fire commissioner to require fire extinguishing equipment in buildings, he could require the installation of perforated pipes, despite the fact that the building code made a similar provision for buildings of a certain character, enforceable by another department.

The Uncertain Status of the Charter Sections in Question.

A consequence is that it is almost impossible to say which of the forty-six sections originally listed for conditional repeal are to be regarded as still in force. The various editions of the charter, including an annotation which has an almost official standing, are hopelessly in disagreement and are all demonstrably inaccurate on this point.

Conclusion Regarding Conditional Repeal Under the Amendatory Act of 1901.

Some will say, perhaps, that the very absence of adjudication shows that the practical consequences have not been embarrassing. They may urge, as a mitigating factor, that, if an ordinance is seriously repugnant to any of the sections which have been conditionally repealed, the intention of the ordinance to complete the repeal will be obvious, and that, if the ordinance is not repugnant in this degree, it does not matter whether both are or are not in effect. Yet situations can readily be imagined and, indeed, situations have been mentioned in other connections in preceding pages, in which it matters greatly whether both of two entirely consistent provisions, differing in antecedents and ramifications, are regarded as in force. The argument, furthermore, takes no account of possible repugnancy between an ordinance and a part only of one of the charter sections. Even if these difficulties could be waved aside, however, the disadvantages of any uncertainty in the legal sources of the city government could not be lightly dismissed. Here again, as in the treatment of building laws under the first Greater New York Charter, the operation of conditional repeal has disclosed ambiguities and dubious effects against which, if the scheme were employed on a larger scale, it would be necessary to take careful guard.

Conditional Repeal in the Grant of Power to Change Salaries.

A further use of conditional repeal, begun in the Greater City Charter of 1897 and carried further in the Amendatory Act of 1901, concerned the vital matter of salaries. The

application was less express than in the two instances already noted, but it was equally a case of the repeal of provisions of existing statutes subject to the passage of ordinances.

The Evolution of the Provision.

The introduction[1] of this feature of flexibility in the charter of 1897 may be examined in order to facilitate an explanation of the slightly different provisions of 1901. The Greater New York Charter, like its predecessors, left the lion's share of the salary-fixing power with the heads of departments rather than with the local legislative body.[2] Section 56, however, stated:

> "The salaries of all officers whose offices may be created by the municipal assembly for the purpose of giving effect to the provisions of this act, shall, subject to the other provisions of this act, be prescribed by ordinance or resolution. The municipal assembly shall have power,

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[1] The charter of 1873, L. 1873, ch. 335, sec. 28 (continued as sec. 48 in the Consolidation Act of 1882) introduced the element of conditional repeal very slightly in conferring salary-fixing power on the heads of departments, stating (italics the author's): "The number and duties of all officers and clerks, employees, and subordinates in every department, except as otherwise herein specifically provided, with their respective salaries, *whether now fixed by special law or otherwise,* shall be such as the heads of the respective departments shall designate and approve, but subject, also, to the revision of the Board of Estimate and Apportionment." It must be noted that the conditional repeal implied in the italicized phrase applied, by reason of a foregoing qualification, only to provisions of special acts omitted from the charter of 1873 and, later, from the Consolidation Act of 1882. The Consolidation Act fixed many salaries specifically and, between these and the salary-fixing power of the heads of departments, there remained little power for the Common Council under sec. 97 of the Consolidation Act (also taken from the charter of 1873): "The salaries of all officers, *whose offices may be created by the Common Council for the purpose of giving effect to the provisions of this act,* shall, subject to the other provisions of this act, be prescribed by ordinance or resolution * * *" (italics again the author's).

[2] L. 1897, ch. 378, sec. 1536, "* * * The head of every department, * * * shall have power * * * to fix and regulate, within the limits of his appropriation and subject to the restrictions, if any, hereinbefore prescribed, the salaries and compensation of said subordinates, appointees and employes." Sec. 233 provided: "The salaries of all officers paid from the city treasury not embraced in any department shall be fixed by the municipal assembly and the board of estimate and apportionment, unless otherwise provided by law or by this act."

> upon the recommendation of the Board of Estimate and Apportionment, to fix the salary of any officer or person whose compensation is paid out of the city treasury, irrespective of the amount fixed by this act, except that no change shall be made in the salary of an elected officer or head of a department during the term for which he was elected or appointed."

The Amendatory Act of 1901, assuming a different theory of administration, cut off the power of the individual heads of departments over salaries. Section 56 was continued and amplified. One phrase was altered: instead of stating "the municipal assembly shall have power * * *" it was made to read, "it shall be the duty of the board of aldermen * * *." One phrase was qualified by the addition of an important exception: after the words, "officer or person whose compensation is paid out of the city treasury," the act of 1901 added, "other than day laborers, and teachers, examiners and members of the supervising staff of the department of education."[1] In addition to these changes, the Amendatory Act of 1901 added provisions which regulated the exercise of the power in two respects. It stated that salaries need not be uniform throughout the several boroughs, but it stipulated the facts which should govern the variation. In the second place, it curtailed the relative power of the Board of Aldermen in salary-fixing, by providing, first, that it should have power only to reduce the salaries recommended by the Board of Estimate and, second, that the Mayor might veto each reduction separately, although many salaries were considered together, and that, unless overriden by a three-fourths vote, such veto would give effect to the recommendation of the Board of Estimate. The section, as amended, closed with the express proviso: "All salaries as fixed on the first day of January, nineteen hundred and two, shall continue in force until fixed by the board of aldermen as in this section provided." As thus reshaped, section 56 has remained unchanged in its permanent

[1] The Charter Revision Commission's draft proposed making an exception only of day laborers; the other exceptions were added in the Legislature.

aspects. One amendment was added in 1902,[1] applicable only in the framing of the budget of 1902, which, as a measure of transition to the new charter, temporarily gave the power over salaries to the Board of Estimate alone. The power itself was not affected.

Early Ambiguities.

The report of the Charter Revision Commission of 1900 shows that it was aware of uncertainties in the original phraseology of the section, as found in the Greater New York Charter. The Commission, moreover, was not blind to the fact that uncertainty offered a welcome excuse when, caught between the general public and groups of interested city employees,[2] both city and state were loath to admit responsibility in the precarious

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[1] L. 1902, ch. 435, approved Apr. 8. The change of jurisdiction made by it terminated May 1, 1902. A complementary measure, L. 1902, ch. 436, amended sec. 10, relating to "expenses of the city for the years 1898 and 1902." It may be noted, in passing, that the Inferior Criminal Courts Act, L. 1910, ch. 659, sec. 104, made a limited application of conditional repeal, stating in part: "The salaries of all justices, magistrates, officers and employees of the Court of Special Sessions and of the City Magistrates' courts shall continue as they exist at the time this act shall take effect, unless and until thereafter changed by the Board of Aldermen upon the recommendation of the Board of Estimate and Apportionment, subject to the veto of the Mayor." Other provisions, which cannot be repeated, limited the scope of this in so far as it applied to the justices. So, too, L. 1915, ch. 581, relating to the Municipal Court, amended sec. 1373 of the charter to read in part: "The Board of Estimate and Apportionment shall, on the recommendation of the board of justices prescribe the number of assistant clerks, stenographers, interpreters, attendants and other employees of the said court for each borough and shall fix their respective salaries, except as herein specifically provided." The salaries of a number of the grades were, however, stated in the amended section.

[2] The Commission remarked: "One of the great evils of our municipal system has been the organized importunity practiced on the Legislature by large classes of city employees. The practice is an evil in itself, is demoralizing to the force, and it operates to relieve the local authorities of that responsibility which ought to be always fastened upon them." Therefore the Commission proposed to extend existing provisions of the charter which prohibited uniformed members of the police and fire departments from membership in associations intended to affect legislation. *Report of the Charter Revision Commission,* Dec. 1, 1900, pp. 46-7. For the pre-existing provisions, see secs. 306 (police) and 739 (fire). The Commission's recommendation was carried out in secs. 536 (street cleaning) and 1099 (education), but was not adopted in sec. 1195 (health).

question of salary control. After stating that the increase of salaries had been the most important factor[1] in a dangerous swelling of city expenditures since the formation of the Greater City, the report continued:[2]

"Unfortunately, it is not possible to fix responsibility for this condition. The local authorities, upon whom responsibility ought justly to rest, point to the fact that in many cases, involving numerous officials, salaries have been raised against their protest by the action of the State authorities. The State authorities, on the other hand, are able to point to a provision in the existing Charter, empowering the Municipal Assembly, upon the recommendation of the Board of Estimate and Apportionment, to fix the salary of any officer of the City Government, whether provided for in the Charter or not. A condition of things under which such extravagant increases in the ordinary expenses of the City are possible, and under which it is impracticable to hold either City or State officers responsible, ought not to continue. It has seemed to the Commission that the power of determining the amount of salaries to be paid ought to be vested absolutely in the officials chosen by the voters of the city itself, and that it is most unfortunate that any action in regard to such a matter should be taken by the representatives of other and distant localities.

"We have therefore recommended that the powers already conferred upon the Board of Estimate and Apportionment and the Municipal Assembly shall be extended so that it shall no longer be merely within the power of the City legislature, but it shall also be its duty, to fix the salary of every person who draws pay from The City of New York. We propose to take

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[1] An indication of a current attitude of up-State leaders was given in Gov. Odell's message to the Legislature, Jan. 1, 1902: "In looking over the salary list of the City of New York, it will be found there are several officials who receive a larger salary than the Governor of the State or the cabinet officers of the United States." Although, he said, interference in city government was as a general rule undesirable, he recommended "action by the Legislature which will absolutely fix a percentage based upon the total tax levy for the salary lists of all municipalities." Ex. Jour., in Appendix to *N. Y. Sen. Jour.*, 1902, vol. 2, p. 16.

[2] *Report of the Charter Revision Commission (to the Governor of the State of N. Y.,) with proposed amendments, etc.*, Dec. 1, 1900, pp. 48-9.

away absolutely from every head of department the power to fix the salaries of his own subordinates—a power which has led to flagrant abuses in the past.

"These provisions, coupled with the abolition of the Board of Public Improvements, and the present costly system of deputies and branch offices in the various boroughs should, we believe, lead to early and substantial reductions in salaries, and to an intelligent classification of subordinates throughout the whole city. Even if it does not, the voters of the city will know whom to blame; and they will have full power and authority, if they choose, to secure through a change of administration a change of policy in this regard."

The Uncertain Scope of the Provision as Revised in 1901.

Unfortunately the revision of 1901 did not remove the uncertainties in section 56. There was no clarifying magic in the substitution of the phrase, "it shall be the duty of," for the words, "shall have power." A two-fold ambiguity continued to lurk in the vital clause, "irrespective of the amount fixed by this act." (1) Did conditional repeal extend to salaries stated in special laws which were not included in the charter, some of which were and some of which were not included in the unsuperseded parts of the Consolidation Act of 1882? (2) Did conditional repeal extend to salaries stated in statutes enacted after January 1, 1902? The second problem had several phases. Could the city authorities change the salary of an office which had existed under the law prior to 1902, if the stated salary had been subsequently altered by charter amendment or other special act of the legislature? Could the city authorities change the salary of an office which had existed in law prior to 1902, if any statutory provisions relating to it had been altered, although without affecting the original salary? Could the city authorities change the salary of an office created after 1902 by a statute which had also stated the amount of compensation?

It is somewhat strange that all doubtful points under section 56 have not been adjudicated. A provision which governs

the control over salaries touches the self-interest of many; one might have expected that every possible situation would be brought to the courts for decision. Litigation has been more than abundant on certain aspects of the matter, especially in connection with control over salaries in the semi-autonomous departments of city government. Yet as late as 1915 it was necessary for the Corporation Counsel to undertake, with an admission of doubt, the answer of the questions which have been outlined in the preceding paragraph. His brief opinion must be our main reliance.

Two cases which approached the problem of conditional repeal as applied to salaries, but which did not come decisively to grips with it, may first be examined. They concerned related, but different, provisions. Baker *v.* City of New York[1] arose under the charter of 1897. It involved the fees of the stenographer employed by the coroners in each borough under a section of the charter[2] which, unlike the previous provision on this point in the Consolidation Act, said nothing about compensation. Hamburger *v.* Board of Estimate[3] arose under the Charter of 1901. It involved the office of coroner's clerk, established by the same section; whereas the Consolidation Act had stated the salary of clerk, the charter, in mentioning this office, expressly stated that the clerk should receive "an annual salary to be fixed by the board of estimate and apportionment and the board of aldermen." The first case involved an attempt to collect the fees for transcripts which the Consolidation Act had stipulated in addition to the salary; the second, an attempt to compel the payment of the salary named in the Consolidation Act instead of a lower amount fixed by ordinance. The question in both cases was whether the provisions of the Consolidation Act regarding the compensation of these offices were still in effect. Section 56 was incidentally discussed, but its bearing was weak-

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[1] (1900) 56 App. Div. 350, 67 N. Y. Supp. 814.

[2] Sec. 1571 in both L. 1897, ch. 378 and L. 1901, ch. 466, subsequently repealed by L. 1915, ch. 284, in effect Jan. 1, 1918, which abolished the coroners.

[3] (1905) 109 App. Div. 427, 96 N. Y. Supp. 130, appeal dism'd 184 N. Y. 577.

ened, in the first instance, by the fact that there it was a fee for a special service about which the charter was silent, and not the salary that was at stake, and, in the latter instance, by the fact that the provision authorizing the office explicitly conferred power to fix the salary on the central governing boards of the city.

Baker *v.* City of New York held that the provisions of the Consolidation Act regarding the stenographer's fees had not been superseded, despite their omission both from the charter and from the ordinances relating to the position.[1] Incidentally, the court tended to construe section 56 narrowly, and to hold that the salary-fixing power of the Board of Aldermen and the Board of Estimate was confined to the offices created by them. Hamburger *v.* Board of Estimate indicated a more liberal interpretation. The Court said of section 56, as amended through 1902, "This seems to have been as broad a grant of power as human language could frame," and it added, "I am inclined to think that 'any officer or person whose compensation is paid out of the city treasury' is limited only by the words 'an elected officer or head of department during his term.'" The factors which compromised the conclusiveness of this decision[2] have been indicated. At least, the concept of conditional repeal of express provisions in existing law was not challenged.

In the face of the poverty of cases in point, when in 1915 the Office of Commissioner of Accounts undertook to study the effect of mandatory legislation upon the New York City budget and found that the full potential extent of local discretion in the fixing of salaries was one of the most important factors which must be discovered, it was necessary to ask the opinion of the

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[1] See *supra*, p. 33, for a discussion of this case in connection with the proposition that the Greater New York Charter did not supersede the parts of the Consolidation Act which it neither covered nor expressly repealed.

[2] Hamburger *v.* Board of Estimate was subsequently cited (according to Shepard's *Cits.*, through Je. 1922) in one case, Walters *v.* City of New York (1907) 119 App. Div. 464, 105 N. Y. Supp. 950. This, however, did not involve the relationship of an ordinance to a prior special law, but involved the civil service law regarding veterans' preference in its relation to local control of positions and salaries.

Corporation Counsel upon submitted questions.[1] The first of these was particular in its terms and need not be considered. The second question read:

> "What is the effect of the provision of section 56 of the Charter giving to the Board of Aldermen power to fix salaries 'irrespective of the amount fixed by' the Charter? This section seems to have been last amended by ch. 435 of the L. of 1902. May the Board of Aldermen change any salary fixed by a section of the Charter passed prior to 1902? May it alter salaries fixed by amendments of the Charter passed subsequent to 1902?"

The Corporation Counsel answered:

> "Referring to question 2, in my opinion the Board of Aldermen, pursuant to the provisions of section 56 of the Charter, may change any salary fixed by a section of the Charter passed prior to 1902. As to salaries fixed by amendment of the Charter passed subsequently to 1902, the answer is not free from doubt. If a section is amended wherein, among other things, the salary of an office or position is provided for, but the amount of the salary or compensation is not changed, I incline to the view that such amendment would not interfere with the power of the Board of Aldermen to fix salaries as provided in section 56. On the other hand, if subsequently to 1902 a section of the Charter has been amended whereby the amount of the salary or compensation of an office or position has been changed, I incline to the view that it would be held that the amount fixed by such amendment would be binding upon the Board of Aldermen and the Board of Estimate and Apportionment."

The third question read:

> "Where a salary is specifically fixed by an act of the legislature at a definite figure, can the Board of Estimate

[1] 46 *Opinions of the Corporation Counsel of New York City*, 415-7, the opinion being addressed to the Commissioner of Accounts on June 10, 1915. For the latter's application of the opinion, see *Report on A Study of the Effect of Mandatory Legislation Upon the Budget for the Year* 1915, issued June 15, 1915, by L. M. Wallstein, Commissioner of Accounts.

> and the Board of Aldermen legally fix such salary at a higher rate?"

To this Corporation Counsel replied:

> "Referring to question 3, I assume you refer to acts other than the Greater New York Charter. I am of opinion that a salary fixed by legislative enactment other than by the Greater New York Charter may not be increased by the Board of Estimate and Apportionment and Board of Aldermen."

The law of the matter can rest here. Such has been the settled practice of the city authorities both before and after.

Proposals to Enlarge Local Power Over Salaries.

Proposals to confer a broader and less equivocal power to change salaries have been introduced in the Legislature in recent years. In the sense that they have remained suggestions and have not become actual provisions of law, their consideration belongs in later pages and there they will be mentioned in connection with the proposal that the City be given power to change its departmental organization regardless of existing law.[1] They may be briefly noted here, however, in order to emphasize the incomplete nature of the power given by section 56 of the charter. In 1915 a bill[2] was introduced by Senator Bennett and

[1] *Infra* p. 124.

[2] S. Int. No. 607; A. Int. 831. Neither was considered on the floor. Of this proposal, the *Report of the Committee on Legislation of the Citizens' Union*, 1915, p. 7, said: "The first bill introduced to give the city control over salaries now mandatory was drafted by your committee. It was introduced by Senator Bennett and Assemblyman Stoddard. It gave concurrent jurisdiction to the Board of Estimate and Apportionment and the Board of Aldermen to fix salaries approximating $30,000,000, or nearly one-sixth of the city's annual budget, over which it now has no control. It included the compensation of county officers and employees, other than justices, but it did not include public school teachers." The proposal was not as recent as the foregoing report indicates. The *Report of the Committee on Legislation of the Citizens' Union for* 1906, p. 11, stated: "Last year and this year the Senate Cities' Committee introduced a bill giving the city complete authority over all salaries paid by the city. This bill has met the determined opposition of the Brooklyn Republican members who seem to think that home rule for Brooklyn is by way of Albany."

Assemblyman Stoddard and another[1] by Senator Cromwell, who had been for so long Borough President of Richmond and a member of the Board of Estimate. In the same session, Mr. Cromwell introduced a charter amendment which proposed to empower the Board of Estimate to fix the number of all appointive officers and employees paid from the City treasury.[2]

In 1916 the proposal to great power to change both the salaries and the numbers of employees was part of the program of the Legislative Joint Committee for the Investigation of the Finances of New York City.[3] Its chairman, Senator Brown, sponsored a bill[4] which, subject to local referendum, proposed to empower the central governing boards of New York City to change the salaries and numbers of city employees and, separately, a bill[5] which advanced similar provisions in relation to county positions. Both passed the Senate, by votes of 41 to 1[6] and 36 to 7,[7] respectively, but only the bill relating to city employees was successful in the Assembly, passing by a vote of 128 to 12.[8] Before its passage it was weakened by the exclusion of members of the teaching and supervising staff in the Department of Education. Mayor Mitchel, who had urged a more emphatic power over both salaries and numbers of all employees, vetoed this partial and doubly compromised proposal. Other bills in the session of 1916 made no progress; at least one of them revealed a motive that was less concern for the administrative

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[1] S. Int. No. 982.
[2] S. Int. No. 1224.
[3] Report of the Joint Legislative Committee for the Investigation of the Finances of New York City, Feb. 7, 1916, in *N. Y. Sen. Docs.*, 1916, no. 25, p. 20. The committee estimated a saving of $2,500,000 annually "by conferring on city power to fix salaries," and a similar economy "in bringing county government under city control." *Ibid.*, p. 21.
[4] S. Int. No. 594, Pr. No. 734; A. Rec. No. 356.
[5] S. Int. No. 590, Pr. No. 1556; A. Rec. No. 357.
[6] *N. Y. Sen. Jour.*, 1916, p. 1257. The single negative vote cast by Lawson, Rep., of Kings.
[7] *Ibid.*, p. 1257. The seven negative votes, in addition to one by Sen. Lawson, were cast by Democrats, of which four were from Kings, one from Queens, one from Bronx, and one (a Sullivan) from New York County.
[8] *N. Y. Ass. Jour.*, 1916, p. 2411-2. The twelve in the negative were New York City Democrats, four from New York County, four from Queens, three from Kings, and one from Bronx.

integration of the City than jealousy for the Board of Aldermen against the encroachments of the Board of Estimate.[1]

Since 1916 the proposals which have been actively promoted have concerned the control of county, rather than city, salaries. Bills[2] to that end, affecting both salaries and numbers of employees, came to nothing in the session of 1919. In 1920, however, a measure[3] proposing to centralize control of the compensation of county employees advanced far enough to afford an interesting vote. After passing the Senate by 41 to 5,[4] it was reported by the Assembly Rules Committee with both the majority and the minority leaders recorded in favor as members of the committee. Suddenly, on the motion of the Republican majority leader, it was recommitted by a vote of 82 to 49.[5] Aside from the members from New York City, the alignment was strictly partisan; all up-State Republicans, with one exception, supported the motion, and all up-state Democrats opposed it. Of the New York City assemblymen who voted, however, only 9 (all Republicans) favored recommittal; 42 City members supported the measure, 23 being Democrats and 19 Republicans. The reluc-

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[1] S. Int. 1457, introduced on Apr. 14 by Sen. Patten, Dem., of Kings, proposing a referendum on the question: "Shall the powers of the Board of Estimate and the Board of Aldermen in respect to salaries be coordinate?" On the previous day Sen. Patten had also introduced S. Int. 1437, providing a scheme of salary control. See also A. Int. 1585.

[2] S. Int. No. 952, S. Pr. No. 1086 (salaries); S. Int. No. 954, Pr. No. 1088 (numbers), both by Sen. Dunnigan, Dem., of Bronx.

[3] S. Int. 457, S. Pr. No. 488 (Sen. Downing); A. Rec. No. 170.

[4] *N. Y. Sen. Jour.*, 1920, p. 603. Of the five opponents of the measure, one was a Bronx Republican, two were Kings Democrats, and two were up-State Republicans.

[5] *N. Y. Ass. Jour.*, 1920, p. 2993. The distribution of the negative vote, favorable to the measure, was in more detail: Democrats: N. Y. Co., 9; Kings, 6; Queens, 1; Richmond, 1; Bronx, 6; up-State, 6; Republicans: N. Y. Co., 7; Kings, 8; Queens, 4; up-State, 1. An interpretation of the circumstances which evoked this vote is given in the *Report of the Committee on Legislation of the Citizens' Union*, 1920, p. 40: "This action" (the report of the measure by the Rules Committee) "was taken by the Speaker under the mistaken belief that Republican leaders in New York City desired it. When this 'error' was discovered the Speaker promised that he would have the measure recommitted. New York City politicians lobbied hard for recommittal. The Citizens' Union made it clear to city members that this measure afforded a particularly good test of New York City's sincerity in regard to municipal home rule. As a result, when Majority Leader Adler moved recommittal, a large number of Republican Assemblymen from the city refused to support his motion."

tance that prompted this defeat was reflected in the elimination from the home rule amendment, while under consideration by the Senate Committee on Affairs of Cities in 1922, of the provision by which the powers of a city containing more than one county were extended to county employees. It is fair to add, however, that the same Legislature at last enacted an amendment to the charter[1] which has greatly enlarged the power of the central city authorities over county salaries, while balancing this extension of control by the abolition of the scheme of separate county tax rates and by thus shifting the cost of county government to the city treasury.

The observer who scents partisan motives at work here may profitably speculate on the reasons why, far from being prominent planks in the program of the minority floor leadership and city spokesmen during the last few years, bills proposing a broad control over city salaries have not even been introduced.[2] He is naive indeed if he is surprised. The history of the provisions on salary-fixing has from the beginning shown rather less of the will to power than of the will to escape it.

The Existing Provision as Precedent and Warning.

To the student of the statutory sources of the government of the Greater City, these considerations are part of his lesson but neither they nor the proposals to broaden the charter provision permitting the change of salaries are his main interest. The provision, as it is already embodied in section 56 of the charter, has for him a double significance. (1) On the point of law, it is a precedent. Limited though its application has

[1] L. 1922, ch. 58.

[2] The absence of such bills is emphasized by noting that the one bill touching the salary-fixing power broadly had an exactly opposite purpose. At the 1921 session A. Int. 1190, A. Pr. No. 1314, introduced by Mr. Burchill, a N. Y. Co. Democrat, proposed the addition of sec. 56a in the charter, providing that no salary of any officer coming within the scope of the preceding section should be lowered below the amount fixed when the act should have taken effect. This bill passed the Assembly on April 14, 1921, by the formally recorded vote of 142:00. *N. Y. Ass. Jour.*, 1921, p. 2362. Becoming S. Rec. No. 524, it ended with reference to committee.

been, section 56 has been an accepted use of a scheme of conditional repeal whereby, without detailed enumeration, express language in statutes can be set aside by local action. (2) In point of draftsmanship, it is a warning. The needless ambiguities already noted give it a lesser place, as a pattern to avoid, beside the two other examples of conditional repeal which have been reviewed.

III.

Proposed Application of Conditional Repeal in a Blanket Grant of Power to Reorganize Departments.

Another seeming short cut to a flexible charter lies in a broad grant by state law of local power to reorganize departments despite the provisions of existing law.[1] It must be regarded in legal theory as a slightly different application of the scheme of conditional repeal. Its possible applications to New York City are two-fold: (1) as an amendment of the existing charter, divorced from any attempt at general revision; (2) on a more ambitious scale, as a basic assumption in a new and briefer charter.

Interest in the more modest possibilities of the device grew as the recent movement for municipal reorganization in the

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[1] A partial application has long existed. Charters since 1873 (L. 1873, ch. 335, sec. 28) have authorized heads of department to consolidate bureaus established by law. As amended, the phrase now runs (L. 1901, ch. 466, sec. 1543): "Any head of department or borough president, may, with the consent of the Board of Estimate and Apportionment, consolidate any two or more bureaus established by law, and may change the duties of any bureau * * *" Partial applications, along a different line, will be found among the acts which, from time to time, have reorganized the structure of departments. See *e.g.*, L. 1916, ch. 528, sec. 4, amending charter sec. 595, subd. 2, in connection with the creation of the Department of Plant and Structures: "The Board of Estimate and Apportionment may in its discretion direct the transfer of the powers and duties of the Police Department, the Department of Street Cleaning, the Department of Parks, the Department of Public Charities, the Department of Correction, the Fire Department, the Department of Health and the Board of Trustees of Bellevue and Allied Hospitals in respect of the construction, maintenance, upkeep and repair of buildings and structures, and the repair of boats, vehicles, apparatus and equipment, to the Department of Plant and Structures."

United States progressed beyond its earlier preoccupation in the central structure of city government and began to place increasing emphasis upon such underlying administrative processes as the allocation of functions, personnel methods, financial control, and the like. A reflection of this interest was the recommendation of the Joint Legislative Committee for the Investigation of the Finances of New York City in 1916 that power be given to the City authorities to consolidate departments, which the committee estimated would save two million dollars annually.[1] No bill to amend the charter in this direction, however, was introduced at the time. The chairman of the Joint-Legislative Committee, Senator Elon R. Brown, doubted the competence of the Legislature to enact it without a constitutional amendment. For three years thereafter his so-called "home rule amendment"[2] embarrassed the advocates of a more comprehensive constitutional grant. Passed only by the Senate in 1916, the "Brown" amendment slipped through both houses in 1917[3] but lapsed in the following year.

In 1918 a bill[4] which proposed to amend the New York City charter by giving power to consolidate and abolish departments

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[1] Report (the first) of the Joint Legislative Committee for the Investigation of the Finances of the City of New York, Feb. 7, 1916, in *N. Y. Sen. Docs.*, vol. 14, no. 25, p. 21. This recommendation was one of fourteen items in the Committee's program of proposed legislation. The investigation had first been authorized by resolution of Apr. 24, 1915, largely provoked by New York City's complaint of embarrassment in the face of a direct tax; the committee was continued by resolutions of Mar. 30, 1916, Jan. 15, 1917, and Apr. 5, 1917.

[2] As introduced in 1917, Sen. Brown's amendment (S. Int. 53, Pr. 1730, as given in *N. Y. Sen. Jour.*, 1917, p. 1900-1) stated, as the gist of its positive side, "the Legislature may by general laws confer upon cities such powers of local legislation and administration as the Legislature may from time to time deem expedient." It does not seem that this wording would have removed beyond all possible doubt by a court disposed to a strict view, the question of the power of a city to set aside the express provisions of existing law regarding departmental organization or anything else.

[3] S. No. 1730; A. Rec. No. 310.

[4] S. Int. No. 446, Pr. No. 1263; A. Rec. No. 345. Introduced Feb. 14 by Sen. Foley, D., of N. Y. C.; passed Senate Apr. 5, by 40:1 (Sen. Lockwood, R., of Kings in negative) *N. Y. Sen. Jour.*, 1918, p. 1029. As A. Rec. No. 345 it died in the Assembly after reference to committee. Apr. 8, *N. Y. Ass. Jour.*, 1918, p. 1662.

passed the Senate. It did not fare as well in the next session,[1] but passed the Senate in 1920 in slightly altered form,[2] and, by this time a hardy perennial, was introduced without result in the session of 1921.[3]

Judicial Construction of the Optional City Government Law in Its Relation to Local Power Over the Statutory Sources of Administrative Organization.

The constitutional feasibility of the scheme was strengthened in 1918 by the ultimate vindication of the Optional City Government Law for second and third class cities,[4] after four years of clouded legality. The act permitted any city in these classes to choose by referendum any one of six forms of government. These were briefly described as regards their central organs and the powers of the latter.

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[1] S. Int. No. 140, Pr. No. 141 (Sen. Foley); A. Int. No. 642, Pr. No. 680 (Mr. Donohue), proposing a new charter section, 44a, providing that Board of Aldermen, on prior recommendation of Board of Estimate and with the Mayor's approval, might abolish any board, body, commission, department or office and transfer its powers and duties to any other agency. These identical bills died in committee.

[2] S. Int. No. 1673, Pr. No. 2141 (Sen. Walker), proposing a new charter section, 113, to authorize the Board of Estimate, with the concurrence of the Board of Aldermen, to transfer functions from one department to another. Advanced to third reading without reference and passed unanimously in the Senate on Apr. 21 (*N. Y. Sen. Jour.*, 1920, p. 1678); becoming A. Rec. 778, ended in Assembly with reference to the cities' committee.

[3] A Int. 591, Pr. 619 (Mr. Donohue). No such proposal was introduced in 1922, doubtless in view of pending charter revision.

[4] L. 1914, ch. 444. A few points of its legislative history may be recalled. A slightly similar bill, applicable to third class cities, was introduced in 1911, in view of the wish of certain elements in Lockport to secure a new type of government. *N. Y. Times*, Apr. 16, 1911, 8:1. In developed form it became part of the program of the Municipal Government Association in collaboration with the Conference of Mayors. After the failure of the bill to move in the regular session of 1913, the Conference of Mayors urged action at the special session and the Governor endorsed the proposal in his special message, July 8, 1913. *N. Y. Sen. Docs.*, 1913 (*extra sess.*), vol. 30, no. 15. Action came in 1914. S. Int. No. 659 (A. Int. No. 835), A. Rec. No. 420, passed in the Senate, Mar. 25, by 47:2 (the negative voters being one Republican and one Democrat, both up-State), *N. Y. Sen. Jour.*, 1914, p. 1361, and passed in the Assembly, Mar. 26, by 135:4 (the opposition consisting of three up-State Republican members and one Democratic member from Brooklyn) *N. Y. Ass. Jour.*, 1914, p. 2047. Approved Apr. 16.

The crucial necessity of the act was to dovetail the new forms, thus outlined, into the very extensive body of pre-existing legislation which affects any city. This was partly accomplished by the familiar legislative devices of continuing all present powers[1] and of repealing inconsistent provisions of law.[2] The acute difficulty lay in the clauses[3] which left it to the city to make a selection from pre-existing law, using bases of selection other than the question of inevitable inconsistency with the stated terms of the Optional City Government Law. At this point, the act predicated a distinction between powers, on the one hand, and, on the other, their location with a particular administrative agency and the regulation of the method of their exercise. While, therefore, pre-existing powers continued, the council under any one of the new schemes was given authority to "confer by ordinance upon any officer or employee of the city any powers, or to impose upon any such officer or employee any duties, theretofore conferred or imposed upon any officer or employee by provision of law." It was provided further that "whenever by any such ordinance all the powers and duties of any appointive officer or employee of the city are conferred or imposed upon one or more other officers or employees, such ordinance may abolish the office or employment." Similarly, authority was given to supersede provisions which governed the method of carrying out any power. It was said that the council should "have power to regulate by ordinance the exercise of any power and the performance of any duty by any officer or any employee of the city; and upon the passing of any such ordinance every provision of the charter or of the second class cities law, applicable to such city, regulating the matters, or any of them, provided for in such ordinance, shall cease to have any force or effect in such city."[4]

Doubt was thrown upon the legality of this vital feature of the act by an opinion of the Attorney General on Jan. 11, 1916.[5]

[1] Art. I, sec. 4.
[2] Art. I, sec. 8.
[3] Art. III, sec. 37, entitled "Effect upon provisions of existing law of adoption of ordinance regulating subject-matter thereof."
[4] Qualifications were here attached to preserve existing restrictions on the methods of granting franchises, disposing of real estate, or incurring indebtedness.
[5] *Report of the Attorney General*, 1916, pp. 79-95.

Could the Council of Niagara Falls, which had voted on Nov. 3, 1914, to operate under one of the forms provided,[1] change the title of Overseer of the Poor, as provided in the former charter, to Commissioner of Public Charities? The answer made by the Attorney General was partly compromised, from the standpoint of the present discussion, by the fact that he held poor relief to be a State function. Many of his statements along this line could easily be construed to forbid grants of power to cities which have been the practice of years. The crux of the opinion, however, was the contention that the Legislature must set definite limits to its grants and that, where it did not expressly repeal its own former laws, it could provide for their repeal only in so far as they might be found directly inconsistent with the stated terms of its new enactments.

The doubt which beset the act was finally allayed in Cleveland v. Watertown,[2] in which, four years after the passage of the act, the Court of Appeals flatly reversed the courts below in regard to the matter before it. The decision is of such interest in connection with the Legislature's power to put its laws at the mercy of ordinances that extended quotation will not be afield. Justice McLaughlin said of the Optional City Government Law:

> "It is complete in itself and the forms of government provided for are also complete. Nothing remains to be

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[1] In the face of these doubts, Niagara Falls was given the city-manager form of government (which it had elected under the optional law) by a special legislative charter of over one hundred pages, L. 1916, ch. 530, approved May 12. This provided, among other things, that (sec. 330) "The passage of this act shall not be deemed to take from the city any powers conferred by ch. 444 of L. of 1914." It was, therefore, comparatively obvious for the Court to hold in People *ex rel.* Shipston *v.* Thompson (1921), 187 N. Y. Supp., 395, aff'd 196 App. Div. 923, 187 N. Y. Supp. 949, aff'd without opinion 231 N. Y. 541, that the enactment of the legislative charter after the city had voted to accept plan "C" did not preclude it from voting later on the adoption of plan "F." The proposed change did not succeed.

[2] (1918) 222 N. Y. 159, rev'g 179 App. Div. 954, 166 N. Y. Supp. 286, which had aff'd. 99 Misc. 66, 165 N. Y. Supp. 305. Watertown was the third city to elect to operate under one of the plans provided, voting for "C" (city-manager form) on Nov. 2, 1915. The lower courts held that the unconstitutional parts were so intertwined in the act as to render the whole invalid.

> done to make the act an existing law. (p. 165) * * * It is in legal effect a new charter which the city does not make, but which it accepts in place of the one it now has, and the only powers delegated are those relating to local self-government which the Legislature can grant if it sees fit to do so. The act does not, as claimed, permit the city to frame its own charter, but presents one to it to be accepted or not and defines, if accepted, the powers of the governing officers" (p. 169).

And, turning to the vexed question of the grant to the council of authority to re-allocate powers, to reshape the conditions governing their exercise, and to abolish offices, the Court seemed to endorse the notion that power is an essence which, unimpaired by changing shapes, can be poured from vessel to vessel, saying:

> "It is true that the section confers great power on the council to control and manage the city government, but this power does not authorize the council to add to or to take from the power already possessed by the city or to avoid the performance of any duty now imposed on it by law * * * Authority to distribute and to regulate the exercise of a power is not equivalent to an authority to enlarge a power already existing" (p. 168).

Although this decision did not dispose of all the questions that inhere in conditional repeal, it seemed at least to clear the way for a method whereby the Legislature can strike a short-cut past detailed provisions of existing law. The decision, therefore, must be given an important place beside the precedents for conditional repeal which have here been discussed, in laying the basis for a parting analysis of the problem of simplifying the statutory sources of New York City government.

CHAPTER V.

THE PROBLEM OF SIMPLIFICATION.

Introductory—Survey of Alternative Methods of Simplifying the Statutory Sources of New York City Government—(I) The Old Method of Blanket Repeal of Inconsistent and Blanket Continuance of Consistent Law—(II) The Outright Repeal of All Prior Law Omitted from a New Charter—(III) The Disposition of Prior Law Through Some Form of Conditional Repeal—(A) Conditional Repeal Through an Administrative Code—(B) Conditional Repeal of All Special Laws Affecting the City Government, Without Detailed Segregation by the Legislature of the Parts Subject to Local Control and Without Time Limit—(C) Conditional Repeal of All Special Laws Affecting the City Government, Contingently Upon the Preparation of a Local Consolidation of the Useful Provisions Thereof—Conclusion.

Introductory.

The simplification of the statutory sources of New York City's government has asserted itself as an insistent problem throughout the preceding pages. It is time to draw together the threads of the discussion. An answer to the problem can best be indicated by surveying the several alternative methods whereby simplification might be essayed, and by recalling the lessons that can be drawn from experience with the devices already described.

A limitation must be borne in mind from the outset. It is idle to expect that a great city can be governed without a detailed body of written provisions in laws or in ordinances. The every-day work of city government touches property and persons at many points and in ways that give rise to lasting relationships not only between the city and private individuals but also between private individuals. Illustrations too obvious to mention are readily forthcoming from such fields of activity as street openings and assessments, on the one hand, and the administration of institutional and out-door relief, on the other. The provisions governing such affairs as these are in the main matters of administrative procedure; it is none the less important, however, that three requirements be satisfied. The provisions should be specific; they should be conveniently assembled; they should be stable enough to accumulate definite interpretations.

This three-fold need has undoubtedly been an influential factor in the development of the characteristic American practice of elaborate city charters. It does not follow, however, that the requirement of an express, assembled, and relatively stable status can be achieved only through legislative enactment. The provisions of the Greater New York charter regarding street openings, for example, have not been more immune from alteration than the locally enacted building and sanitary codes..

Survey of Alternative Methods of Simplifying the Statutory Sources of New York City Government.

The simplification of the statutory sources of New York City's government, it is evident, involves two phases: (1) the form of the charter, in the narrower sense of the latter term; (2) the relationship between the charter and the pre-existing bodies of law applicable to the city. Actually the two phases of the problem are inseparable, and the second conditions the first. The charter, in the formal sense, may be shortened, but if it allows other special city laws to continue without provision for their subsequent modification locally, it remains in fact a long charter. Furthermore, if the charter seeks to adjust the relations between itself and the earlier bodies of law by means of broad clauses of uncertain application, the charter is in fact complicated, however simple its terms may appear. The form of the charter may be changed by the division of its provisions between a charter, proper, and an administrative code, but this device is chiefly significant as a method of giving the local authorities control over details hitherto fixed in state law. Alterations in the form of the charter are thus so dependent for their real effect upon the relation established between the charter and the earlier laws surrounding the city government that the possible changes in form are best revealed incidentally in an analysis of possible methods of disposing of old law. Unless attention is directed sharply to the latter, the simplification of the city's law can easily be confused with what is merely the simplification of the task of charter revision.

Charter revision, then, must provide for the disposition of the masses of pre-existing law. What are the alternatives? They are stated briefly in outline, as a prelude to their examination one by one.

(I) It is possible, in enacting a new charter, to employ the method used both in the original Greater New York Charter and in the Amendatory Act of 1901. This method is to repeal blanket-fashion whatever in pre-existing law is or may later be found to be inconsistent with the charter or covered by it, and in the same sweeping way to continue the remainder. This method may be varied by accompanying the new charter with the specific repeal of numerous prior acts. But unless these specific repealers exhaust the earlier legislation, the blanket repealing and saving clauses just described will be indispensable.

(II) It is possible to make the charter a virtual consolidation of all the provisions of special law, old and new, that are deemed necessary to the operation of the city government, and, without qualification other than a general clause preservative of existing proprietary rights and perhaps the enumeration of certain specifically excepted acts, to repeal everything else. This method really comprises two alternatives, depending upon whether the charter is short or long.

(III) It is possible, in adopting a new charter, to apply some plan of conditional repeal to the special laws not embraced by the new charter itself. Three variations of the method are open:

(A) The provisions of law affecting the city may be segregated in two documents, both of which would receive the initial approval of the Legislature, but one of which (called, perhaps, the administrative code) would thenceforth be amendable locally. Unless the code were deliberately made a consolidation of all provisions of earlier law not covered by the charter (an arrangement not advocated in the proposals for an administrative code thus far broached), it would still be necessary to dispose somehow of an unknown body of pre-existing law; this could be done by the use of the qualified repealing and saving clauses indicated under the first heading, or by outright repeal, or by conditional repeal.

(B) The Legislature may enact a new charter as a single, brief instrument, and may declare all other special legislation applicable to New York City government to be subject thenceforth to modification by local action.

(C) Features of the two foregoing procedures may be combined in a third variation of the method of conditional repeal. A new charter may be enacted to take effect on some future date, with a provision repealing all other special New York City legislation as of that date, and with the requirement that in the meantime the city authorities shall sift all this prior legislation and shall incorporate necessary provisions from it in a coherent body of ordinances.

Such, in the barest outline, are the alternatives by which the simplification of the statutory sources of the city government may be attempted. The ground can now be retraced more slowly, and each alternative examined in turn.

(*I*) *The Old Method of Blanket Repeal of Inconsistent and Blanket Continuance of Consistent Law.*

The possibilities indicated under the first heading can be quickly dismissed. It would be a calamity, a quarter of a century after the adoption of the Greater New York Charter, to copy the expedient for which even then shortage of time was a poor excuse. The effect would be to prolong indefinitely the statutory confusion that has long surrounded the city government.

The difficulties that have attended upon the use of loose repealing and saving clauses in the New York charter have been indicated. In the first place, it is uncertain what laws actively apply to the city today. The factors that have combined to produce this condition need be recalled only briefly. (a) The New York City Consolidation Act of 1882 (which, like all other special New York City legislation antedating the Greater New York charter, remains in force except in so far as it has been repealed specifically, or by reason of inconsistency with later statute law, or by reason of the fact that its subject-matter has been revised or included in some charter provision) has been assumed to be the foundation of the Greater New York Charter; but the Consolidation Act of 1882 cannot be clearly proved to have exhausted

earlier legislation, and the search for active law on any point, if it is to be absolutely sure, must examine the statutes back to 1784.[1] (b) After 1882, furthermore, the legislation was again scattered by the enactment of laws that did not in terms amend the Consolidation Act.[2] (c) The charter of 1897 did not attempt to clarify the confusion but merely repealed provisions which were inconsistent or the subject-matter of which it covered in terms or effect.[3] (d) The charter of 1897 further created uncertainty by conferring on the Greater City an unknown legacy of powers formerly possessed by the smaller consolidated municipalities, and it complicated matters still further by extending through the area of the enlarged city all such provisions of consistent law affecting the old City of New York as "are not in their nature locally inapplicable to other portions of the city."[4] (e) The Amendatory Act of 1901 did not cure the situation; if anything, it left it worse in that, although it specifically repealed numerous sections of the charter of 1897, it continued parts of the latter that it did not reprint. (f) Since 1897 the passage of special acts which have not in terms amended the charter and which frequently have amended neither charter nor Consolidation Act has gone on unchecked at the rate of two for every formal charter amendment.[5] As a result, the boundaries of the statutory sources of New York City's government are intricate on all sides and at several points are quite obscure.[6] In the second place, aside from the difficulty of finding out all the provisions of law that may apply to a given situation, the question of consistency or inconsistency can be answered only by judicial or administrative decision. The disclosure of the real charter proceeds slowly, as situations present themselves acutely enough to provoke such decisions. Phases of the city's law are still unresolved.

Such are the elements of uncertainty that inhere in the policy

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[1] *Supra*, pp. 35-52, for an analysis of the problem of repeal under the Consolidation Act.

[2] *Supra*, pp. 10-15.

[3] *Supra*, pp. 28-32, for a recital of the repealers and saving clauses of the Greater New York Charter and of the Amendatory Act of 1901; pp. 32-35, for examples of the application of these provisions in the courts.

[4] *Supra*, pp. 52-56.

[5] *Supra*, p. 18, and table, in Appendix A.

[6] *Supra*, pp. 80-82, for a skeletonized presentation of the situation, the evolution of which is traced broadly in the first chapter.

of continuing consistent and repealing inconsistent prior law. The extent of the resulting inconvenience cannot be measured merely in public actions litigated in courts of record; its real extent could be read, if it were possible to trace it at all, in perplexity, investigation, and delay in the round of public administration and also in private disputes that distantly involve the city's law. But the inconvenience that results from uncertainty is not the sole, nor even the greatest, disadvantage attendant upon this policy of repeal. Its inevitable effect is to conserve statutory details and to place these beyond the reach of the local authorities. In so far as a new charter allows these to continue without increasing local power over them, it detracts from whatever seeming brevity may be given to its formal contents and whatever seeming breadth may be given to its grant of power.

These disadvantages might be lessened, of course, through the use of a list of specific repeals, whereby the more patently superseded or unnecessary laws might be disposed of at a stroke. Such a device at the best would be a partial corrective, however, unless the repealers were exhaustive (and to make them so would constitute a quite different policy of repeal, discussed under the next heading); it would still be necessary to fall back upon general clauses of repeal. Furthermore, no extensive use of specific repealers is possible without a close examination of the existing statutory sources. It is sheer waste to enter far on such an examination except under a plan that purposes to cover the whole and to dispose with finality of what it finds.

No new charter can genuinely simplify the statutory basis of New York City's government if it introduces general clauses that repeal inconsistent and permit the continuance of all that is consistent in existing law. The experience of the city, while it furnishes ample precedents, condemns the further use of the device.

(*II.*) *The Outright Repeal of All Prior Law Omitted from a New Charter.*

The second group of possibilities, characterized by the definitive repeal of prior legislation, deserves more respectful consideration. The objective—a charter that in itself will express all the active provisions of special law applicable to the city gov-

ernment—can be approached by two courses that are very different in method and in consequences. On the one hand, a relatively brief charter might be drawn, and, without any attempt at detailed examination of the earlier statutory sources of city government, all prior legislation might be cleared away by a slashing phrase. On the other hand, the existing legislation might be treated more conservatively, and, at the price of much pains and with the final result of a relatively lengthy document, the charter might be made a veritable consolidation of all active provisions of law applicable to the City of New York. One of these courses is a counsel of courage, perhaps of rashness; the other, of caution and patience; both at least avoid the line of least resistance into which previous charter revisions have so unfortunately slipped. The two possibilities require separate comment and appraisal.

(A) A *brief* charter accompanied by the sweeping and immediate repeal of all prior legislation is a novel and adventurous proposal in the light of the city's history. The earlier chapters have shown the extent to which the laws affecting the city lie outside the formal charter. If the charter were shortened, the relative importance of the omitted matter would probably be increased. Would it be safe to repeal all this outlying legislation at a stroke? If a ready and sure reply were possible, the statutory confusion that engulfs the charter would not be truly chaos. No certain answer can be extracted from the adjudicated cases in which application has been given to provisions illustrative of the mass of law in question.[1] Vital issues, it must be admitted, have not been in evidence. If the policy of a sweeping repeal were adopted, doubtless the most serious risk—the possible disturbance of existing property relations—could be off-set in large measure by the use of a clause preservative of existing rights; a suggestion for such a clause, if not an exact pattern, is found in the phrases attached to the Brooklyn Consolidation Act of 1888.[2]

[1] *Supra*, pp. 34, 48.

[2] L. 1888, ch. 583, "An Act to revise and combine in a single act all existing special and local laws affecting public interests in the City of Brooklyn." Sec. 35 recited: " * * * all local and special acts passed prior to Jan. 1, 1888, relating to the corporation of 'the City of Brooklyn' designated in sec. 1 of title 1 of this act or to the administration of the

Nevertheless, although one cannot in candor raise alarms over the dangers involved, the scheme of a sweeping and immediate repeal in connection with a relatively brief charter must be declared a faulty method of disposing of an elaborately interwoven fabric of statutes. The disturbance of the existing legal basis of numerous details of administrative procedure, in the absence of provision for a transition, is enough to condemn it. If the choice lay between such a method and the former method of loose repealing and continuing clauses, doubtless it would be preferable to incur the possible risks of drastic, outright repeal and to rely upon later legislation to correct any extreme situations that might appear in practice. Fortunately the choice is not so narrow; other methods are open.

(B) The second variation of the method of sweeping and immediate repeal of prior law contemplates a longer charter—a charter that would be a genuine consolidation of all the active provisions of law applicable to New York City. The plan implies a detailed scrutiny which, going back of the charters of Greater New York, back of the New York City Consolidation Act of 1882, back also into the legislative histories of the other amalgamated communities, would comb the session laws from the beginning. It is a task which has not been done for forty years and which has needed doing nearly as long. It is a task which the preparation of a digest-compilation of the special statutes affecting the municipalities now included in the Greater City, published in 1922 after nearly eight years spent in preparation, has made appreciably easier.[1] But it is a task which cannot be done quickly

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property or affairs of said corporation, except * * * " (here the act named four specific acts) * * * "are hereby repealed; provided, however, that nothing in this section contained shall abrogate, annul, impair, or in any manner affect the corporate powers, rights, privileges or franchises of the said 'the City of Brooklyn,' or any lien, contract, right, title or interest heretofore acquired by said corporation or by any other person * * * ." The remainder of the proviso was the usual stipulation to protect actions already instituted. The use of the term, "corporate powers" in this connection is of doubtful wisdom. It is one thing to attempt to protect the vested property interests of the city; it is quite another matter to preserve powers and thus to complicate future questions as to the competence of the city to act by introducing an obscure if not unknown quantity into the definition of local power. For further comment on this point, *infra*, pp. 151-2.

[1] *Supra*, p. 25, for a description of its scope.

and which should not be undertaken unless the execution can be thorough and the results definitive. It is a task, therefore, which in practice must either be performed before charter revision begins (and it has been in this sense, as a prelude to a revision of the charter with reference to governmental structure and other major problems of policy, that a consolidation of local laws has been especially advocated during the last decade),[1] or it must be provided for afterward.

Aside from these practical obstacles, arising from shortage of time and inadequacy of staff, the plan of a charter that would be a complete consolidation of existing laws (without differentiation of parts subject to local control) presents a grave objection from the standpoint of current opinion regarding city government. It presumes a detailed charter, restrictive of city powers. These defects conspire to make the plan seem impracticable in execution and undesirable in consequences.

The possibilities thus far discussed ought probably to be rejected on one ground or another. The first group of methods would prolong the double disadvantage of uncertainty and of the dependence of the city upon many detailed statutory provisions. The second group would either assume the risk and inconvenience of a summary repeal, or, if it were sought to make the charter a real consolidation, would encounter both the practical obstacles to its preparation and the permanent embarrassment of an elaborate statutory basis for city government. What is needed, evidently, is some more flexible system of repeal.

(*III*) *The Disposition of Prior Law Through Some Form of Conditional Repeal.*

The third group of possibilities involves varying applications of what has been called conditional repeal. The term indicates a scheme whereby the Legislature repeals statutory provisions contingently upon the enactment of ordinances in their place. Although the repeal is technically a legislative act, the laws in

[1] *Supra*, pp. 23-4, for illustrations of this point of view.

question are thus made subject practically to local modification. The advantages of the method are two-fold: it does not repeal out of hand but permits a transition by means of substitution; it transfers control over detail from state to local authorities.

Conditional repeal is not new in connection with New York City statutes; several instances of its use have been described at length in the preceding chapter. It was applied to the building laws by the charter of 1897,[1] and to forty-six designated charter sections by the Amendatory Act of 1901;[2] less directly, it has been used with the limited grant of local power to fix salaries irrespective of the provisions of existing law,[3] and it has been considered in connection with the proposed grant of local power to reshape administrative organization.[4] Not only has the legality of these several precedents for conditional repeal passed unchallenged, but the decision in Cleveland *v.* Watertown [5] (arising in another connection) has tended to confirm the competence of the Legislature to authorize the local authorities, in carrying out a new charter, to dislodge statutory provisions in regard to city administration which are found to be unsuitable, although such statutory provisions have not been repealed specifically and although they are not positively inconsistent with the terms of the new charter.

Yet the execution of schemes of conditional repeal may present serious difficulties. The composite experience with the several uses of the device has shown three sources of trouble: (1) the problem of defining clearly just what provisions of the law are covered by the conditional repeal and are accordingly subject to local action in the future; (2) the problem of defining precisely what form local action must take in order to effect the repeal; (3) the less vexing problem of defining the power of the Legislature, before the repeal is effected, to amend a provision that has been conditionally repealed, and the related problem of defining the effect of such intermediate amendment by the

[1] *Supra,* pp. 97-104.
[2] *Supra,* pp. 104-111.
[3] *Supra,* pp. 111-124.
[4] *Supra,* pp. 124-126.
[5] (1918) 222 N. Y. 159, construing the Optional City Government Law of 1914. For a discussion, *supra,* pp. 126-129.

Legislature upon the subsequent status of the provision in question. These difficulties [1] are inherent but not irremediable; careful drafting can largely remove them. Their presence, however, constitutes an important factor in choosing between the several variations of the broad method of conditional repeal which are discussed in the following paragraphs.

(A) Conditional Repeal Through an Administrative Code.

The plan of an administrative code is akin in principle to the uses already made of conditional repeal under the Greater New York charter. Two important differences, however, distinguish this proposed embodiment of the idea. (1) The first is one of degree. Instead of dealing with one subject merely, as in 1897, or with a few miscellaneous sections, as in 1901, the plan of an administrative code involves so much of the material of the old charter that a sweeping simplification is possible. (2) The second is a difference of method. Whereas the 1897 charter repealed all provisions on a particular subject, building regulation, without attempting to locate these laws or to indicate their repealable portions, and whereas the charter of 1901 designated certain sections in the old charter, without attempting to distinguish the varied matter within each section, the plan of an administrative code presumes that the Legislature itself will discriminate and segregate, breaking up the sections of the old charter and of the other special city laws and regrouping their provisions.

The one official attempt in New York State to work out this combination of features was prepared in connection with the ill-fated charter submitted to the Legislature of 1909. Even as a draft, the proposed code of that year failed, in ways that will shortly appear, to carry to a logical conclusion the idea on which it was supposedly founded. Out of it came an interest with which movements for charter revision have had to reckon ever since. The unsuccessful project of 1907-9 must still serve as the center in any discussion of the idea. The plan of an administrative

[1] For an exposition of these problems as they have appeared in existing schemes, see especially, *supra,* pp. 101-104; 107-111; 116-120.

code for New York City seems to have originated with Mr. Ivins In any event, it was not a subject of controversy within the Commission, although two of the members, on the grounds of defects of hurried workmanship, eventually declined to approve the submission of the code-draft. The argument on behalf of the plan figures prominently in the Commission's reports. After reviewing the history of special legislation and of charter tinkering, the Commission said:[1]

> "The foregoing review of the evils of continual legislative interference in matters of local government and of the extremely complicated character of the present city organization, suggests the necessity for dividing the charter into two parts, one to constitute the organic law of the city's being; the other, an administrative code for the guidance of the departments created by that law."

The Commission was impressed by an analogy that it believed was found in the relation of constitutions to statutory law in nation and in states; the charter of a city, it argued, should be a fundamental law. The report continued:[2]

> "The administrative code, if this plan of revision be adopted, should contain all of the purely administrative provisions of the present charter, amended so as to harmonize with the revised organic law. The Legislature should enact this code in the first place. Thereafter, its amendment should be in the control of a local legislative body, and should be made so difficult of enactment by the State Legislature as to prevent mandatory expenditures, improvements, increases of salaries, and other interferences in local affairs without the clearest possible demand from the responsible city authorities, or the people of the city as a whole."

Throughout its work, the structure of the charter, rather than the structure of government, chiefly engaged the energies of the Commission. It was to improvements in the form of the charter

[1] Report of the Charter Revision Commission of 1907 to the Governor, Nov. 30, 1907, in *N. Y. Sen. Docs.*, vol. 2, no. 10, p 18. *Cf.* virtual suggestion of repealable code in 1900 by City Club and by City Vigilance League.

[2] *Ibid.*, pp. 19-20.

that the Commission pointed with the most satisfaction in its final report.[1]

The execution of the plan was marred by two defects. The first was the belatedness of its presentation and its incompleteness. Whereas the Commission reported to the Legislature on March 8, 1909 and a bill that embodied the draft of the charter, proper, was introduced at that time, the administrative code was not presented until April 20. When it was presented, it was offered only "as an aid to the legislative committees, and not as a bill for passage."[2] Yet this course was defended as a matter of policy. At a committee hearing on March 23, when question was raised about the missing code, Mr. Ivins said that the Commission could not submit it until it had received a yes or no on the charter; it would then submit it chapter by chapter, as each corresponding part of the charter was taken up for detailed consideration.[3] Without the text of the code, however, the Legislature could not easily answer the question of a fundamental reorganization in the form of the charter itself.

A second and more important defect in the plan was the

[1] Report of the New York Charter Commission to the Legislature, March 8, 1909, in *N. Y. Sen. Docs.*, 1909, vol. 6, no. 27, p. 6. "The chief value of the Commission's work and the feature of it which has required the most time and care is its attempt to give intelligible and coherent shape to the entire charter and to separate the organic or structural matters of city government from adjective or administrative details."

[2] Letter of transmittal, April 20, 1909, printed with the code draft in *N. Y. Sen. Docs.*, 1909, vol. 6, no. 27. A postscript expressed the dissent of J. H. Dougherty and N. A. Elsberg: "We cannot approve of the transmission of this document, the work of the Commission being in our judgment not sufficiently advanced for report to the Legislature." The Commission's report, *op. cit.*, p. 7, made a virtue of what, one fears, was merely necessity, stating: "Because of the flexibility of the code and the ease with which it may be modified to conform with legislative decision upon the charter, and as well because of lack of time to frame to the full satisfaction of the Commission the several code chapters, it has been deemed wise to defer the presentation of the code until the legislative committees shall have reached their conclusions. The charter may be considered independently of the adminstrative code, but the converse proposition is not true."

[3] *Brooklyn Standard Union*, Mar. 24, 1909. Mr. Dougherty was doubtless nearer the true explanation when he begged the committee not to press for an early submittal of the code; it was too much, he said, for flesh and blood to stand. *Idem.* Shortly afterward, the interested but hostile correspondent of the Standard Union wrote in the issue of April 6: "Contrary to general expectation, the Ivins' adminstrative code is being rushed to completion."

Commission's failure to propose that the whole of the administrative code should be subject to alteration by the local legislative body. On this point the Commission's own reports were somewhat confusing. The draft of the charter submitted on April 8, 1909, stated that "The council may alter, amend or repeal the administrative code as expressly provided therein." [1] This left the process of repeal to be clarified in the draft of the code. When that document finally appeared, it stated: "The council shall have power by ordinance to repeal, modify or amend the following chapters and titles of this act." [2] A blank space followed. It was thus indicated that the code would be divided in practice into two classes of provisions—the unenumerated parts being amendable only by the State Legislature. But the all-important enumeration was not given. In their report no more than a vague hint was given of the principle that the Commission intended to be applied: [3]

> "It (the council) may also amend certain specified sections of the administrative code which are so local in their operation that they may properly be altered by the city legislature, thus relieving the State Legislature from consideration of unnecessary administrative detail."

The stark interrogation of the blank spaces in the draft of the code crowned the uncertainty that characterized throughout the manner in which the Commission submitted this proposal.

Did not the Commission fatally compromise the idea with which they worked? Are not the advantages of segregating detail in an administrative code destroyed unless the whole of it is subjected to alteration locally or at least to some mode of amendment that differs substantially from that applicable to the charter proper? Certain advantages may be admitted to exist regardless of a different method of amending the administrative code. A shorter charter might be more readily popularized; the funda-

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[1] Ch. III, "The Council," sec. 35. The drafts of the charter and of the code are available, among other places, in *N. Y. Sen. Docs.* 1909, vol. 6, no. 27.

[2] Ch. II, "The Council," Title II, "Powers," sec. 28a.

[3] *Op. Cit.*, p. 11.

mental features of city government comprised in such a charter might by custom (although in the absence of a constitutional amendment no legal barrier would protect it) achieve relative immunity from tinkering by friend or foe. But against such possible advantages must be set the serious disadvantage of a further scattering of the law. To the charter and ordinances of the city, the scheme of 1909 would have added in effect two new elements—the one consisting of the parts of the administrative code made subject to local amendment and the other, of the parts subject to legislative control—and this is not to mention the uncoordinated special laws and relevant provisions in the general statutes. The proposal could not have failed to result in increasing the confusion in the legal sources of the city government. Unless all of its provisions are subject to a wholly different method of amendment (presumably by local authorities), the separation of a civil administrative code from the charter is not simplification but complication.[1]

After the still-birth of the Ivins report, the plan of an administrative code passed under a cloud. It was directly repudiated by the Legislative Joint Committee on the Charter of the City of New York (to which the work of the Commission was referred as to a receiver in bankruptcy); it was not broached seriously at any stage in the charter revision movement which, beginning under the auspices of the city authorities in 1910, side-tracked the other proposals but went down in defeat in the dramatic charter controversy of 1911. The argument with which

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[1] In so far as the Commission dropped from both charter and administrative code details (and did not throw them into the penal law, the code of criminal procedure, the public officers' law, and other general statutes, this being another phase of their scheme of simplification), the Commission's recommendations did affect the power of the state over the city. Their 1909 report stated: "The charter will consist of 75,000 words; the present charter contains over half a million. The administrative code will be no larger than the charter. The charter and code together will be about one-quarter the volume of the present charter." *Op. Cit.*, p. 7. It must be added, on the other side of the account, that the repealing clauses in the Commission's draft of the code repealed the Consolidation Act and the Greater New York Charter and their amendments, but said absolutely nothing about other legislation affecting the City of New York.

the Legislative Joint Committee dismissed the plan showed that "simplification," like most slogans of reform, is double-edged:[1]

> "The tendency of modern legislation is toward simplification and the inclusion of all cognate matter in one instrument—a policy most recently exemplified by the enactment of the 'Consolidated Laws.'
>
> All who have had occasion to examine a charter find it much more convenient and less confusing if they are able to find under one title, chapter or other division, related subject-matter. In this view we are confirmed by the opinion of officials and others, who have had occasion to constantly study or interpret the provisions of the existing charter. * * *
>
> In view of the plan of the Commission in regard to the authority to be conferred upon the local legislative body, it seems to have been deemed desirable that the provisions which would be affected by the power to repeal or amend should be contained in a statute separate from the charter. It is unnecessary to discuss at length the extent or limitation of the power of the Legislature to delegate the authority to repeal or amend legislative acts in the manner proposed; for in the opinion of the Committee such comprehensive power should not be delegated to a local legislative body even if constitutionally possible.
>
> Thus another reason advanced by the Commission for an administrative code separate from a charter ceases to be controlling."

But the Legislative Joint Committee did not quite turn its back on the idea of dislodging some material from the body of the charter. Recalling the example of the conditional repeal of certain sections in 1901, their report said:[2] "It will be necessary, however, to retain in a proposed charter many provisions

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[1] Report of the Legislative Committee on Charter of the City of New York, transmitted to the Legislature, Jan. 28, 1910, in *N. Y. Ass. Docs.*, 1910, no. 5, pp. 7-8.

[2] *Op. Cit.*, p. 10.

which properly have no place therein, but which must remain until the board of aldermen passes ordinances with reference thereto."

Advocacy of an administrative code, however, did not cease with the death of the Ivins' proposal. Speaking on November 19, 1914, Mayor Mitchel was quoted as saying:[1]

> "In my opinion, the City charter should be divided into two distinct portions. There should be a general grant to be the organic law of the City. This should be brief and broad. Then there should be an administrative code corresponding to the by-laws of a corporation, which should be easily amendable by the local legislative body, subject of course to the Mayor's veto."

Endorsed from its inception by the elements dedicated consciously to municipal reform,[2] the idea of simplification through an administrative code completely subjected to local control became almost a commonplace with civic organizations.[3]

Nevertheless, despite the many off-hand endorsements given it, the scheme of an administrative code to be adopted by the Legislature simultaneously with the enactment of a new charter is open to grave objections. The question of the inclusiveness of the code is fundamental. Will the code, as passed by the Legislature, cover all the statutory provisions that now affect the government of New York City, with the exception of those

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[1] *N. Y. Times,* Nov. 20, 1914, 9:1. See also comment by Mr. McAneny (then President of the Board of Aldermen and chairman of the Charter Revision Committee of the Board of Estimate) before the Academy of Political Science, *Proc. of the Academy of Political Science,* April, 1915, vol. V, no. 3, p. 228.

[2] See, for example, remarks in the *Proceedings of the Buffalo Conference for Good City Government,* 1910, pp. 34-90.

[3] For example, the New York City Club's Committee on Charter Revision, 1921: "The most immediate and practicable method for relieving this situation would be a separation of the subject matter of the present charter into a charter proper and an administrative code * * * The general scheme of classification recommended by the Ivins Commission could well be followed, but with a sharper emphasis upon the point that all provisions placed in the Administrative Code are to be subject to local amendment or repeal." *Report on Charter Revision, Prepared by the City Club for Submission to the New York Charter Commission,* Dec. 1921, pp. 4-5.

embraced in terms or effect in the new charter and of those definitely repealed? If the answer is in the affirmative, the scheme of an administrative code is defensible in theory; but it then falls before the practical difficulty of effecting a comprehensive examination and consolidation of local laws in the midst of the onerous burden of charter revision. If the answer is in the negative, the scheme misses the heart of the problem of simplifying the statutory sources of city government. There would remain, outside both charter and code, a vague borderland of statutes. These ought somehow to be disposed of. To dispose of them by a simple declaration that inconsistent provisions were repealed and consistent provisions were continued would entail the evils already discussed. To repeal them outright without examination would incur the risks already indicated. The third alternative would be to dispose of them by some method of conditional repeal. The unfortunate result of the latter course would be to give rise to at least four, and probably five, bodies of law specially applicable to New York City: first, the charter; second, the code; third, statutory provisions not covered by either charter or code, but subjected to conditional repeal; fourth, the common ordinances; fifth, there would probably also be a number of special statutes not subjected to conditional repeal and standing quite separate.

Such are the disadvantages inherent in the proposal that an administrative code be adopted simultaneously with a new charter. It is fair to note, however, that there is one important consideration which may favor the adoption even of a partial code. The Legislature might deem it necessary, in giving its assent to a new charter, to make preliminary adjustments in the outstanding details of administrative organization and procedure, before putting these at the disposal of the local legislative body. If the legislature were to assume this attitude, a code would be a reasonable expedient. In such a case, however, the code should be characterized by the following features: it should be represented expressly as a beginning only; the local legislative body should be given the same power over the borderland of statutes applicable to the city that it has over the code.

(B) *Conditional Repeal of All Special Laws Affecting the City Government, Without Detailed Segregation by the Legislature of the Parts Subject to Local Control and Without Time Limit.*

A second use of conditional repeal would consist in a brief stipulation that, consistently with the terms of the new (and presumably shortened) charter, the local legislative authority might modify all statutes specially affecting the government of the City of New York, with the possible exception of certain statutes specifically enumerated. This method would avoid the double difficulty noted in connection with the proposal of an administrative code. It would extend the principle of conditional repeal through all or nearly all of the statutory sources of the City government; yet it would not throw the task of an immediate examination of these sources upon the shoulders of men pressed for time and preoccupied with the broader aspects of the charter. But it, too, has defects that warrant its rejection if a more satisfactory escape can be found.

In the first place, it invites on a magnified scale those difficulties of drafting and those uncertainties in execution that have been noted in connection with earlier, partial uses of conditional repeal under the Greater New York charter. Not all the acts that affect New York City, affect New York City peculiarly; not all the acts that peculiarly affect New York City, affect the government of the City, as distinguished from private or semi-private interests therein; even the acts that specially affect New York City government, are frequently not involved as whole acts, but only in respect to scattered provisions therein. The method of repeal now under consideration would entail a definition by a broad phrase [1] of the class of provisions in the statutes

[1] *E. g.* (to quote from a recent proposed draft of a shortened charter): "The power of legislation conferred upon the City by this Act includes the power to supersede, wholly or in part, as to and within the City of New York or to re-enact in modified form, so as to have the force of law with respect to and within the City, any law or portion of law of the State of New York, heretofore or hereafter enacted, which deals with any matter solely of municipal or local concern in or to the City of New York, including, among others, all matters concerning which powers are delegated to the City by this Act, save in respects as to which power is not so delegated * * * ."

of New York State that were thenceforth to be subject to modification by the local authorities. Even the most careful drafting could hardly devise a phrase that would not leave in the future endless uncertainty what statutory provisions were or were not subject to local control.

If the plan were adopted, it would be important in the interest of orderliness to require the local authorities to exercise their broad power of superseding statutory provisions only by specific reference to the statutes repealed or modified.

In the second place, the method would allow the precious opportunity of charter revision to slip by without guaranteeing an end of the present confusion in the statutory sources of the City government. The plan of course would permit, but it would not definitely invite, let alone require, an early concerted examination and consolidation of the provisions of law applicable to the City The scattered condition of the City's law could go on indefinitely. The situation would be relieved, to be sure, by reason of the transfer of the amending power from the state capitol to the city hall. Even this advantage would be largely compromised, however, by the fact that it would be hard, not only to say whether the pre-existing statutory provisions relevant to any situation were subject to local modification, but even to find out what statutory provisions were relevant.

(C) *Repeal of All Special Law Affecting the City Government, Contingently Upon the Preparation of a Local Consolidation of the Useful Provisions Therein.*

The search for a practicable method of disposing of the masses of special statutes not covered in the charter leads to a final alternative. This method combines features of the two schemes of conditional repeal already discussed. In its bare essentials, it would involve the following steps: (1) the enactment of a new and shortened charter, to take effect upon a date fixed at least two or three years in advance; (2) the provision therein for the repeal, as of that date, of all statutes or parts of statutes affecting the government of New York City except

such as the Legislature might specifically reserve from repeal; (3) the concomitant requirement that in the meantime a local body (appointed, perhaps, by the law department of the City) [1] should examine all legislation thus subjected to repeal and should prepare an orderly consolidation of whatever in it was of current use; (4) thenceforth, this consolidation would be subject to local modification.

Within these essential outlines of the plan, several lesser though important features can be variously adjusted. One feature concerns the submission of the local consolidation to the State Legislature. It is obvious that a report of some kind should be rendered, since the preparation of the consolidation would be pre-requisite to the completion of charter revision. Doubtless it should be made the duty of the local authorities in this report to recommend the re-enactment of such statutes, if any, within the scope of the repeal as might be thought to need a continued statutory basis. Thus an opportunity would be afforded for corrective or precautionary action, especially necessary on the border-line between legislation affecting public and that affecting merely private interests. As for the local consolidation itself, it is hardly desirable that the Legislature should pass it; it would be enough, by a separate enactment, to recognize and to confirm it as the consummation of the new charter.

A second mooted feature concerns the relation between the local consolidation and the common ordinances. Should they be united, or should they continue as separate bodies of law? The principal factor in determining the answer is the method of amendment provided for each; the only justification for keeping them separate would lie in the provision of a different, and presumably more difficult, procedure for the modification of the consolidation based upon provisions previously contained in the statutes. This factor depends in turn upon elements—especially

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[1] A precedent for this is found in the manner of appointing the commissioners who, under L. 1879, ch. 536, prepared the compilation approved by L. 1880, ch. 595, entitled, *The Special and Local Laws Affecting Public Interests in the City of New York*, and of appointing the commissioners (in practice, the same men) who, under L. 1880, ch. 594, and L. 1881, ch. 572, prepared the New York City Consolidation Act of 1882. *Supra*. pp. 8-9.

the organization of the local legislative power and the attitude taken toward it—which lie outside the present study. If an opinion may be ventured here, it must be said that (assuming the charter itself is not enacted locally) there should be only one method of local legislation and one body of law subject to modification locally. Accordingly, the local body charged with the original consolidation should be instructed to consider the existing ordinances also and to throw them into a common melting pot along with the mass of conditionally repealed statutes. As matters now stand, the ordinances parallel statutory provisions and needlessly duplicate their language at many points.

Conclusion.

The alternative methods of disposing of the masses of prior special law have been passed in review. The actual choice of a method must be conditioned by circumstances, and no abstract *a priori* judgment regarding the relative merits of these methods can be final. One thing can be said in conclusion, however. Under the circumstances that have characterized charter revision in the past and that are likely to attend it in the future, the method last described seems preferable. Its advantages have been revealed in the discussion of the defects of the other alternatives. This method seems to combine most satisfactorily the elements of inclusiveness and finality, and at the same time to avoid choking the process of charter revision with a task of multitudinous detail.

It is presumed that any attempt at the simplification of the city's law will cover, not only the statutes relating directly to the present and to the old City of New York, but also those relating to the numerous local governments that at one time or another have existed within the area of what is now Greater New York. The nature of the vague devolution upon the present city of the powers of these former governments has been noted in a previous chapter.[1] This vague devolution should be ter-

[1] *Supra*, pp. 52-56.

minated. The fact that little practical resort has been made to it as a source of power does not render it less desirable to cut off even the possibility. As long as it remains, an unknown quantity is injected into the definition of city power, and both the city authorities and those who have dealings with the city are invited to a recurring search into the obscure legislative histories of long defunct governments. After more than a score of years of experience under the Greater New York charter, it should be quite feasible, with the advice of the administrative departments, to find whether there are items, touching power or procedure, which should be expressly saved from the general repeal; if so, these can best be picked up and preserved in the local consolidation outlined in the preceding paragraphs. Furthermore, the general saving clause in the new charter, in so far as it touches this matter, should concern the City's heritage of property interests, not governmental powers. A similar policy should be taken toward the royal charters, which survive as sources of city government.[1]

Simplification of the statutory sources of city government must reckon with more than the accumulations of special law. An earlier chapter sought to show the extent to which the sources of New York City government lie in general laws.[2] An attempt should be made to clarify, in its application to the metropolis, the usual rule that loosely governs the relation of general and special statutes on municipal matters. Doubtless, much material (penal provisions, for example) previously found in the charter and in other special laws could be dropped bodily and left to the appropriate chapters of the consolidated laws. On the whole, however, the circumstances of New York City government seem to dictate that a clearer paramountcy should be given to the laws peculiarly applicable to it. The City must be conducted under an elaborate body of special provisions, made by the state or the locality; furthermore, in so far as the special statutes affecting the City are reduced to simpler terms, it is presumably with the intent of broadening the scope of local power. It is advisable, therefore, that the charter should

[1] *Supra*, pp. 56-58.
[2] *Supra*, Ch. III, p. 59, *et seq.*, especially p. 78.

declare that no provisions of general law, present or future, should apply to New York City unless this be expressly stipulated therein. It would then be necessary for the Legislature, in enacting any provisions of general application in the field of municipal affairs, to come directly to grips with the question of its application to New York City. The necessity would be wholesome. Indeed, in view of the perennial difficulties inherent in overlapping general and special law, it would be an advisable legislative policy to state expressly in every general act affecting city government the exact scope that such act is intended to have.

Simplification of the statutory sources of New York City government is not a static problem. It is a matter for continuing vigilance. Prevision at the time of charter reorganization cannot prevent, but it can lessen, the opportunity for confusion to reassert itself, as it did after the passage of the New York Consolidation Act of 1882. That act, as has been said, not only failed to demonstrate its intent regarding the repeal of prior legislation, but also, by its policy of disregarding laws deemed temporary in effect, partly invited a speedy disintegration through the enactment of special city laws that did not in terms amend it. It is the duty of charter revision to facilitate the development, in the field of municipal government, of the sound principle already applied to the public statutes of the state, so that in the future every act within the power of the Legislature to pass, however particular and however temporary in its affirmative effect, will at least be related in its terms to some recognized body of law.

Whatever the circumstances and the method, an end should be made of the confusion that characterizes the statutory sources of New York City government. Too long has it been tolerated by neglect, by caution (equally unfortunate in its effect), and by a sense of haste that has hitherto cost the loss of each opportunity to deal comprehensively and decisively with this fundamental feature of genuine charter simplification.

APPENDIX A.

NEW YORK CITY LEGISLATION
1900–1921

Year	Introduced			Action by Mayor			Repassed by Legislature after Mayor's Veto	Action by Governor		N. Y. C. Laws Enacted	
	Amending Charter	Special but Not Amending Charter	Total	Submitted		Vetoed		Vetoed after Mayor's Approval	Signed after Mayor's Veto	Charter Amendments	Not Charter Amendments
					Recalled						
1900	...	...	552	241	0	158	14	..	14	18	..
1901	...	...	...	135	0	71	11	..	5	8	27
1902	...	...	591	103	0	41	0	18	0	17	26
1903	136	288	424	165	2	81	0	..	0	27	48
1904	149	226	375	162	1	45	0	25	0	40	52
1905	145	297	442	168	0	55	5	24	4	38	65
1906	147	463	610	142	0	40	0	32	0	22	43
1907	221	430	651	179	0	36	8	50	7	36	77
1908	169	265	434	69	0	14	0	13	0	22	28
1909	110	258	368	89	0	27	0	20	0	19	33
1910	162	298	460	97	0	40	0	4	0	23	41
1911	132	382	514	120	5	45	0	6	0	24	57
1912	140	460	600	95	2	21	0	6	0	42	46
1913	246	307	553	157	5	41	0	30	0	39	58
1914	110	150	260	86	0	28	0	5	0	31	32
1915	140	230	370	95	3	22	0	7	0	28	53
1916	142	199	341	95	0	30	1	0	1	37	42
1917	170	344	514	117	1	31	1	17	1	37	50
1918	94	263	357	93	4	33	0	12	0	19	54
1919	122	244	366	91	0	39	1	5	1	17	42
1920	126	256	382	120	0	41	1	1	0	31	85
1921	120	248	368	130	1	57	3	20	3	23	59

SOURCES: The data in this table have been partly collected and partly computed from the *Legislative Index* and other records. It has been checked at most points by comparison with unpublished memoranda in the legislative bureau of the Law Department of New York City. The table is added for a humble purpose and makes no claim of completeness nor of accuracy. The meaning of special city legislation is an uncertain factor which (to say nothing of other grounds of difference) is likely to bring discrepancies between any computations of the amount of city legislation.

LAWS PASSED WITHOUT ACCEPTANCE BY CITY: 1900, Ch. 283, amending charter to restrict power of water commissioner to contract for supply with private persons or corporations; Ch. 461, regarding qualifications of engineers in N. Y. C.; Ch. 463, amending charter in relation to assessment of pumping stations in Nassau County; Ch. 465, authorizing appointment of commission to investigate N. Y. C. charter; Ch. 615, amending charter in relation to printing names of officials in City Record; Ch. 629, amending charter in relation to testing of gas meters; Ch. 647, altering Kings County Hall of Records to accommodate surrogate, etc.; Ch. 653, providing for Silver Lake Park in Richmond County; Ch. 663, amending charter in relation to offensive trades in Brooklyn; Ch. 751, amending charter, in relation to school funds; Ch. 764, for opening, etc., of Bedford Ave., Brooklyn; Ch. 765, for opening of Remsen Ave., Brooklyn; Ch. 770, for relief of taxpayers of 32nd ward, Brooklyn, in providing for field survey; Ch. 776, to establish exterior pier line on shores in Borough of Brooklyn. 1901, Ch. 33, reorganizing police department to provide single head; Ch. 297, for improvement of Atlantic Ave., Brooklyn; Ch. 466, new charter; Ch. 551, relief to Engine Co. in Borough of Richmond; Ch. 590, for improvement of Bedford Ave., Brooklyn. 1905, Ch. 629, amending charter by taking franchise granting power from Board of Aldermen; Ch. 631, amending Rapid Transit Act; Ch. 638, amending charter in regard to commitment of intoxicated persons; Ch. 758, for election of additional justices in Brooklyn. 1907, Ch. 91, changing location of cost for widening Livingston St., Brooklyn, as fixed by Board of Estimate; Ch. 429, Public Service Commissions established; Ch. 538, Ch. 558, recount of mayoralty vote in cities of first class; Ch. 600, to inquire into charter; Ch. 712, for accommodation of county clerk, etc., in Hall of Records; Ch. 748, removal of patients from hospitals restricted. 1916, Ch. 601, right of Westchester communities to draw water from N. Y. C.'s supply. 1917, Ch. 719, removal of tracks on 11th Ave. 1919, Ch. 470, providing celebrations, etc., for returned soldiers in city containing one or more counties, etc. 1921, Ch. 167, for Extension of Southfield Blvd., Richmond; Ch. 518, amending charter, in relation to furnishing room and supplies to supreme court; Ch. 670, amending charter, in relation to aldermanic districts.

APPENDIX B.

CONSTITUTIONAL HOME RULE AMENDMENTS IN THE N. Y. LEGISLATURE

1911–1922

The bare legislative history of these proposals is summarized here because of the fact that the possibility and the waxing and waning probability of a constitutional change have necessarily reacted on the consideration of charter revision and of the statutory devices discussed above.

Session	Concurrent resolutions introduced (identified by introductory number, last print number, name of introducer, and number received in other house)	Action in Legislature (Further than committee reference)			
		Senate	Citation to *Sen. Journal*	Assembly	Citation to *Ass. Journal*
1911	*S. Int. 199, Pr. 203 (Grady); A. Rec. 609	Passed July 19, by 38:16	p. 2472	Passed July 21, with no recorded opposition	p. 4213
1912	†S. Int. 1253 (Burd) S. Int. 347 (Loomis)				
1913	†S. Int. 1060 (Pollock) A. Int. 475 (McGrath) A. Int. 1693 (Sufrin)				
1914	†A. Int. 827, Pr. 1666 (Phillips); S. Rec. 600 †S. Int. 674 (Pollock)	.....	.....	Passed Mar. 27, by 128:00	p. 2277
1915	No proposals in Legislature; Constitutional home rule proposal (Int. 712) adopted by Constitutional Convention by vote 120: 17 (*Rev. Rec.*, p. 3885-7) and embodied in Art. XV, sec. 3, of draft defeated at polls, Nov. 2, 1915.				
1916	×S. Int. 820, Pr. 1673 (Brown): A. Rec. 464 †S. Int. 1000, Pr. 1129 (Mills) †A. Int. 1323, Pr. 1546 (Welsh) ‡S. Int. 847, Pr. 928 (Wagner) S. Int. 44 (Bennett) A. Int. 810, Pr. 891 (Gilroy)	Passed Apr. 15, by 29:11 (Wagner's motion to amend defeated, 22:11)	p. 1377		
1917	×S. Int. 53, Pr. 1730 (Brown); A. Rec. 310 †A. Int. 752, Pr. 829 (Welsh); S. Rec. 706 †S. Int. 428, Pr. 469 (Mills) ‡S. Int. 691 (Foley) A. Int. 1289, Pr. 1521 (Shiplacoff) A. Int. 555, Pr. 593 (Goodman)	Passed Apr. 18, by 48:7 ..... (Motion to substitute S. 691 lost, 12:31; to substitute S. 428 lost, 12:30)	p. 1125 ..... p. 455	Passed May 8, by 137:2 ..... Passed May 2, by 78:37	p. 3051 p. 2825
1918	×S. Int. 866, Pr. 1315 (Brown); A. Rec. 272 †S. Int. 560, Pr. 628 (C. F. Murphy) †A. Int. 683, Pr. 757 (Welsh)	Passed Mar. 27, by 46:1 (Motion to substitute S. 560 lost	p. 769	Apr. 13, laid aside while on order of 3rd reading	p. 2363

Session	Concurrent resolutions introduced (identified by introductory number, last print number, name of introducer, and number received in other house)	Action in Legislature (Further than committee reference)			
		Senate	Citation to *Sen. Journal*	Assembly	Citation to *Ass. Journal*
1919	†A. Int. 659, Pr. 2000 (Welsh) †S. Int. 739 (Lockwood) ‡S. Int. 103 (Foley) S. Int. 1350 (Block)	.....	.....	Reported Mar. 2, dropped Apr. 19, after being engrossed for 3rd reading	p. 2690
1920	†A. Int. 351, Pr. 2260 (Pellet); S. Rec. 690 ‡S. Int. 407, Pr. 433 (Walker) ‡A. Int. 455, Pr. 482 (Donohue) S. Int. 159, Pr. 161 (Law)	.....	.....	Passed Apr. 24, by 78:36	p. 3150
1921	†S. Int. 140, Pr. 142 (Simpson) †A. Int. 352, Pr. 353 (Stitt) ‡S. Int. 236, Pr. 243 (Walker) ‡A. Int. 602, Pr. 636 (Donohue) A. Int. 582, Pr. 610 (Ullman) S. Int. 729, Pr. 806 (Duggan)				
1922	†S. Int. 58, Pr. 1816 (Tolbert) †A. Int. 890, Pr. 2009 (Ullman) ‡S. Int. 80 (Walker) ‡A. Int. 44 (Donohue) A. Int. 7 (Antin) S. Int. 15 (Simpson) A. Int. 54 (Leininger) A. Int. 148 (Cuvillier) S. Int. 1060, Pr. 1233 (McGarry) A. Int. 1200, Pr. 1278 (McKee)	Passed Mar. 17, no recorded opposition	.....	Passed Mar. 17, no recorded opposition	

*Hardly a true "home rule" amendment, in sense of opening way for local charter-making.

†Sponsored by Conference of Mayors, and known after 1915 as "Mayors conference proposal"; before 1915 promoted especially by Municipal Government Association.

xFathered by Chairman of Joint Legislative Committee on Finances of New York City, in belief that without constitutional amendment city could not be given control over its prescribed administrative organization.

‡Introduced by the Democratic Floor Leaders.

INDEX OF CASES.

VITA

The author of this monograph was born in Brooklyn, May 29, 1890. He was prepared in the Rutherford (N. J.) High School and graduated from Columbia College in 1912, receiving the degree of Bachelor of Arts "with high honors." Subsequently he pursued graduate studies under the Faculty of Political Science of Columbia University, doing his major work under Professors H. L. McBain and T. R. Powell and Dr. (then Professor) C. A. Beard. In 1913 he was given the degree of Master of Arts. From 1913 to 1917 he was instructor in government in Columbia College, and he resumed this position in 1919.

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